No. _____ (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

CITIZENS FOR A CONSTITUTIONAL CONVENTION, LET THE PEOPLE DECIDE, and MARK J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, and JERRY BECK, on behalf of themselves and others similarly situated,

Petitioners,

v.

DWAYNE D. YOSHINA, Chief Election Officer of the State of Hawaii, MAZIE K. HIRONO, Lieutenant Governor of Hawaii, BENJAMIN J. CAYETANO, Governor of the State of Hawaii, in their official capacities; OFFICE OF ELECTIONS, STATE OF HAWAII; HAWAII STATE AFL-CIO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN SCOTT MICHAELS*
**Counsel of Record*
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, NY 10022
(212) 909-7265

MARK J. BENNETT
McCORRISTON MIHO MILLER MUKAI
Five Waterfront Plaza
Honolulu, HI 96813
(808) 529-7300

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Petitioners sought federal judicial relief to bar the retroactive enforcement of *Hawaii State AFL-CIO v. Yoshina*, 935 P.2d 89 (Haw. 1997), which held that "blank ballots" returned by 45,245 Hawaii voters to poll officials in 1996 were "ballots cast upon [the] question" of whether Hawaii should hold a constitutional convention by 2000 A.D. *Yoshina* nullified an administrative order that those voting for a convention won the 1996 plebescite and retroactively overturned the state's practice whereby, as the Court of Appeals for the Ninth Circuit held below, " 'Yes' votes were counted against 'no' votes and the majority ruled." In the federal District Court, Petitioners sought: (1) an order certifying the 1996 plebescite as having passed; or (2) an order directing a new vote. The District Court granted the second prayer, but the Ninth Circuit, in an initial opinion, reversed, and denied rehearing. A day before rehearing was denied, Hawaii's Governor signed Act 131, which re-placed the "con-con" question on the November 1998 election ballot.

The questions presented by this Petition are as follows:

1. Whether, in light of the precepts set forth in *Lawrence v. Chater*, 516 U.S. 163 (1996) (per curiam), the Ninth Circuit's judgment should be vacated and remanded with instructions to consider the effect of Hawaii Act 131, its history, and the vote to be held pursuant to its direction, upon Petitioners' claims for (a) equitable relief and (b) attorneys fees and other costs pursuant to 42 U.S.C. § 1988, or, if the Court believes it appropriate, remanded with other instructions to the court of appeals?

QUESTIONS PRESENTED – Continued

2. Whether, if this Court does not enter other relief: (a) Hawaii's failure to certify the 1996 convention question as having passed violates the federal constitutional rights of Hawaii's citizens to a fair election, to have their votes counted as cast (as enunciated in *United States v. Classic*, 313 U.S. 299, 309 (1941), and its progeny), or to be able to "act in a timely fashion" under state election laws (as stated in *Burdick v. Takushi*, 504 U.S. 428, 438 (1992)); (b) if not, whether Petitioners are still eligible for an award under 42 U.S.C. § 1988 in light of the enactment of Act 131?

PARTIES TO THE PROCEEDING

This action was commenced in the District Court by Petitioners, who are five individual Hawaii voters (Mark J. Bennett, Charles S. Frumin, Bobbie Carinio, Mark R. Spengler and Jerry Beck) and two citizens' groups, "Let the People Decide" and "Citizens for a Constitutional Convention." Neither "Let the People Decide" nor "Citizens for a Constitutional Convention" are corporations, and therefore there are no parent or subsidiary companies to be listed for purposes of this Court's Rule 29.6. Plaintiff classes were certified in the District Court and Petitioners appear here on their own behalf as well as in their representative capacities. Respondents (Defendants below) include the Governor, Lieutenant Governor, and Chief Election Officer of the State of Hawaii, in their official capacities only, as well as the Office of Elections, State of Hawaii. The Hawaii State AFL-CIO was a putative intervenor in the courts below, as were the following additional persons: Gary W. Rodrigues, Russell Okata, Keith Ahue, Jackie Ferguson-Miyamoto, Donald Abdul, Nilda Chock, Clayton Dela Cruz, Guy Fujimura, Carmela Gomez, Leonard Hoshijo, Jonathan Kane, Mark Matsumoto, Stuart McKinley, Richard Rutt, Lawrence Sakamoto, Howard Tasaka, Peter Trask, Adaline Uhrle, George Yasumoto, Michael Amii, Dennis Chang, Patricia A. Chow, Garen R. Deweese, Leslie Anne Deweese, Jan Doi, Robert Doi, Melvin Fong, Kimberly Haines, William Hoshijo, Marsha R. Joyner, Calvin Koseki, Leimalama Lee Loi, Robert Matsunaka, Laverne Moore, Janette M. Nagao, Robert H. Nagao, Craig Nahm, Ayako Nakanishi, Douglass Pang, Larry Sakoda, Ethel Shintaku, Andrei

PARTIES TO THE PROCEEDING – Continued

Soto, George Thomas, Lelani Thomas, Linda N. Thomas, Jeanine Tsuchiya, Maureen Wakuzawa, Harry Woodd, and Lana Young. Although not parties below, they are named as Respondents on this Petition in an abundance of caution.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Citizens for a Constitutional Convention, et al., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 27, 1998, as amended by the court's order of June 23, 1998.

OPINIONS BELOW

The amended opinion of the Court of Appeals is reported at 140 F.3d 1218 (9th Cir. 1998), and is reprinted in Appendix ["App."] A. The Ninth Circuit's initial opinion is reprinted in App. B. The District Court's summary judgment order is unreported and is printed in App. C.

The stay orders of the courts below are printed in Apps. D, E, and F. Other orders of the District Court are printed in Apps. G, H, I, and L. The Ninth Circuit's June 2, 1998, order denying a stay of consideration of the petition for rehearing is printed as App. J. The mandate is printed in App. K. The Ninth Circuit order denying rehearing is printed in App. N. The opinion in *Hawaii State AFL-CIO v. Yoshina* is published at 935 P.2d 89 (Haw. 1997).

JURISDICTION

The judgment of the Court of Appeals was entered March 27, 1998, and a timely petition for rehearing was filed by Petitioners on April 10, 1998, and denied on June

23, 1998. *See* App. N. The time in which this Petition was to be filed originally extended to and included September 21, 1998. On September 11, 1998, Associate Justice O'Connor granted an extension of time to and including October 21, 1998, and this Petition is timely filed. *See* App. M.

Although a suggestion of partial mootness and related motions to recall the mandate and for other relief were filed below July 7, 1998 (App. P), as of this date the Court of Appeals has yet to act on the same. The Ninth Circuit's judgment is, however, final in all relevant respects.

Jurisdiction in the District Court was conferred by 28 U.S.C. § 1331 and *Ex Parte Young*, 209 U.S. 123 (1908). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. Jurisdiction in this Court lies under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

Article III, section 2 of the United States Constitution provides in relevant part that

> The judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . [and] to Controversies. . . .

The First, Fifth, and Fourteenth Amendments to the United States Constitution provide in relevant part that

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people

> peaceably to assemble, and to petition the Government for a redress of grievances.
>
> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .
>
> No State . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983 of Title 42, United States Code, provides in relevant part that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1988(b) of Title 42, United States Code, provides in relevant part that

> In any action or proceeding to enforce a provision of section[ ] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Rule 39(a), Fed. R. App. P., provides in relevant part that

> Except as otherwise provided by law, . . . if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is

vacated, costs shall be allowed only as ordered by the court.

Article XVII of the Constitution of Hawaii (1978) provides in relevant part that

> Section 1. Revisions of or amendments to this constitution may be proposed by constitutional convention or by the legislature.
>
> Section 2. The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" If any nine-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question to be voted on at the first general election following the expiration of such period.
>
> If a majority of the ballots cast upon such a question be in the affirmative, delegates to the convention shall be chosen at the next regular election unless the legislature shall provide for the election of delegates at a special election.
>
> . . . .
>
> The constitutional convention shall convene not less than five months prior to the next regularly scheduled general election.
>
> . . . .
>
> The revision or amendments [proposed by the convention] shall be effective only if approved at a general election by a majority of all the votes tallied upon the question, this majority constituting at least fifty per cent of the total vote cast at the election, or at a special election by a majority of all the votes tallied

> upon the question, this majority constituting at least thirty per cent of the total number of registered voters.
>
> The provisions of this section shall be self-executing, but the legislature shall make the necessary appropriations and may enact legislation to facilitate their operation.

Section 11-137 of Hawaii Revised Statutes (HRS) provides in relevant part that

> No person shall take a ballot out of the polling place except as provided in sections 11-135 and 11-139. After voting the voter shall leave the voting booth and deliver the voter's ballot to the precinct official in charge of the ballot boxes. . . . If any person having received a ballot leaves the polling place without first delivering the ballot to the precinct official as provided above . . . the person shall forfeit the person's right to vote[.]

Section 11-151(3), HRS, provides that

> Each contest or question on a ballot shall be counted independently as follows: . . . (3) If a contest or question requires a majority of the votes for passage, any blank, spoiled, or invalid ballot shall not be tallied for passage or as votes cast except that such ballots shall be counted as votes cast in ratification of a constitutional amendment.

Act 131, 1998 Haw. Sess. L., is printed at Pet. App. 270a.

STATEMENT OF THE CASE

A. Summary.

This case arises out of a post-election ruling by the Hawaii Supreme Court that 45,245 "blank ballots" returned by voters to poll workers at the 1996 general election were the equivalent of "no" votes on the question whether Hawaii should hold a constitutional convention by the year 2000. The ruling, *Hawaii State AFL-CIO v. Yoshina*, 935 P.2d 89 (Haw. 1997), overturned a 3,716 vote victory for those seeking a convention. Absent legislative or federal judicial intervention, *Yoshina* left the electorate to wait until 2006 for the next vote on the "con-con" question.

In the federal lawsuit brought by Petitioners against *Yoshina*'s retroactive enforcement, the Ninth Circuit agreed that, under past practice, blank ballots "were simply ignored" and that " 'Yes' votes were counted against 'no' votes and the majority ruled." Pet. App. 7a. Nonetheless, the Ninth Circuit reversed a judgment directing a new election at which *Yoshina*'s supermajority rule would be known in advance. *Id.* at 22a. In a novel ruling, which strained to distinguish conflicting decisions from the First and Eleventh Circuits, the Ninth Circuit held that because voters returning blank ballots "did not care or did not care enough" to cast a "yes" or "no" ballot, they delegated to the State a right to transform the neutral act of returning a blank ballot card into legally effective speech "having the same effect as 'no' votes." *Id.* at 21a.

On June 22, 1998, one day before the court below denied rehearing, Respondent Governor of Hawaii signed

into law a bill directing submission to the Hawaii electorate "on the ballot at the general election of 1998" "the question, 'Shall there be a convention to propose a revision of or amendments to the [state] Constitution.' " Pet. App. 270a. The law (Act 131) directs Respondents, as a matter of state law, to do that which, as a matter of federal law, the District Court below directed them to do in the judgment Respondents appealed to the Ninth Circuit: hold a new vote. *See* App. C, D, E. That vote will occur November 3, 1998.

The panel was told of the potential enactment of Act 131 on May 5, 1998, in Petitioners' motion to stay consideration of their petition for rehearing and suggestion for en banc review. This motion was filed after the bill passed, but before the Governor's 45-business-day deadline for acting.[1] On June 2, 1998, the panel denied the motion.[2]

Although Act 131 technically existed when the court denied rehearing on June 23, 1998, the order doing so did not even cite the new Act. App. M.[3] With minor amendments to the opinion, the panel denied rehearing, finalized its reversal, and taxed costs against Petitioners.[4]

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[1] *See* Pet. App. 271a-274a (noting action in both Houses).

[2] *See* Pet. App. 120a-121a.

[3] The State Officials did not even acknowledge Act 131's existence to the panel until Petitioners filed a suggestion of partial mootness and motion to recall the mandate and for other relief on July 7, 1998. *See* App. Q. As of this date, the Ninth Circuit has not acted on the motion to recall the mandate.

[4] The mandate, issued automatically pursuant to Fed. R. App. P. 41(a), reflects this disposition. App. K.

Although they lost the battle in the Ninth Circuit, Petitioners won the war (or at least a major part of it) " 'without formally obtaining relief.' "[5] As one legislator stated without contradiction during the debate on HB 3130:

> Judge Ezra ruled that under the Hawaii Supreme Court's ruling and their decision, the vote was unfair – greatly unfair – because the people didn't know that the blank and spoiled votes would be considered as "no" votes. So here we are today, passing this measure[.]

Pet. App. 281a.

A remaining issue is whether the States, through their courts, may, consistent with Due Process, retroactively revise vote-counting practices in such a way as to "effectively 'stuff the ballot box,' " *Roe v. Alabama*, 43 F.3d 574, 581 (11th Cir. 1995), and, if not, whether that is what occurred here and whether an order to "un-stuff the ballot box" is the appropriate federal remedy. A second important issue is whether the "catalyst" theory remains a basis for recovery under 42 U.S.C. § 1988,[6] and, if so, whether Petitioners have a valid claim under that theory.

In its present posture, however, the threshold issue in this case is whether, under *Lawrence v. Chater*, 516 U.S. 163 (1996), the panel judgment should be vacated and the case remanded for further review in light of Act 131.

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[5] *Maher v. Gagne*, 448 U.S. 122, 129 (1980) (quoting S. Rep. No. 94-1011 (1976) at 5).

[6] As the Ninth Circuit has noted, there is a direct conflict in the circuits on this issue. *See Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995).

B. The 1996 Election and the *Yoshina* Decision.

Article XVII, § 2, Haw. Const. (1978), provides for a "vote" every ten years on "the question, 'Shall there be a convention to propose a revision of or amendments to the Constitution?' " If a "majority of the ballots cast upon such a question be in the affirmative," a convention must be held. *Id.* In 1996, the question was on the ballot with three proposed constitutional amendments, choices for presidential electors, federal, state, and county officials, and on Kauai, charter amendments. *Id.* at 166a-167a, 177a.

Hawaii, in 1996, and for years previously, employed a ballot system using standard-sized computer cards, the number "depending on the number of offices, candidates to be elected thereto, [and] questions or issues to be voted on[.]" HRS § 11-1 (1993). Ballots were marked by punching holes in places next to a name, or, on ballot questions, in the spot on the ballot marked "yes" or "no." Pet. App. 177a. Voters could leave cards "blank" for any race or question. In 1996, there were three cards (four on Kauai). *Id.* at 165a.

Section § 11-137, HRS, provides that "[i]f any person having received a ballot leaves the polling place without first delivering the ballot to the precinct official . . . the person shall forfeit the person's right to vote[.]" This law, in existence for approximately 100 years, was enforced in 1996 via written instructions to poll workers. Pet. App. 161a-163a.

The Chief Election Officer is "responsible for public education" concerning the ballot, HRS § 11-2(d), and, in 1996, informed voters that "blank ballots" were not

counted in determining a majority on the convention question. Every polling place was provided with the "voter information packet" explaining the "meaning" of a voter's choices as follows:

Meaning of a "Yes" Vote	*Meaning of a "No" Vote*
A "Yes" vote means that a constitutional convention should be convened to revise or make amendments to the State Constitution.	A "No" vote means that a constitutional convention should not be convened.
If a majority of the ballots cast for this question are "yes," delegates to the convention will be elected during the next regular election, unless the legislature provides for the election of delegates at a special election.	

Pet. App. 176a. No "meaning" was given to "blank ballots." The sheet was "available to voters at each polling place," and *every* voter could "pick it up." *Id.* at 170a-171a.[7]

Respondents also made "Fact Sheets" available to the public and posted them on the "Internet." They stated:

> [T]o determine whether the constitutional convention will be held, more than 50% of the

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[7] The State maintained no record of how many voters did "look at it," *id.*, and by law there were no "poll watchers" allowed on the ballot questions to provide any contemporaneous account. HRS § 11-77 (only "political parties" are allowed poll watchers).

> voters must vote YES. Spoiled, blank, and invalid ballots are not included in the calculation of a majority for this question.

Pet. App. 174a.[8]

This view was not new.[9] Mr. Yoshina testified: "[I]t was the historical practice of [the Office of Elections] and the Office of the Lieutenant Governor that in determining whether the Con Con question received a majority, blank ballots did not count as ballots cast." Pet. App. 150a. There was "no question at all": "[I]t was clear." *Id.*[10]

When the polls closed on November 4, 1996, 369,357 ballot cards containing the con-con question were returned: 163,869 were marked "yes," 160,153 were

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[8] This interpretation drew for support on HRS § 11-151(3).

[9] The Office of Elections was so sure of its position that it quashed the efforts of Citizens for a Constitutional Convention to tell voters that "blank ballots would count essentially as 'no' votes"; "there was telephone contact made with some woman who was part of that group, and she was told that it was incorrect." Pet. App. 151a-153a. Citizens' treasurer was "told that blank votes would not count in determining a majority"; if the state employee who phoned her did what "should be done," the treasurer was "told not to disseminate" contrary facts. *Id.*

[10] Indeed, in interpreting Article XVII, § 2 as embodying a simple majority requirement, Respondent Yoshina followed the "almost, if not quite, unbroken current of judicial decisions from the time of Lord Mansfield to the present day, that when an election is held at which a subject-matter is to be determined by a majority of the voters entitled to cast ballots thereat, those absenting themselves, and those who, being present, abstain from voting, are considered as acquiescing in the result declared by a majority of those actually voting, even though, in point of fact, but a minority of those entitled to vote really do vote." *Walker v. Oswald*, 11 A. 711, 713 (Md. 1887).

marked "no," 45,245 were blank, and 90 were marked both "yes" and "no." After obtaining an Attorney General's opinion that the blank ballots did not count (Pet. App. 157a), the Chief Election Officer certified that the convention question had passed, and was then sued by the Hawaii State AFL-CIO, which up to that moment never challenged the Election Office's views.

In *Yoshina*, the Hawaii Supreme Court held that the Attorney General, the Chief Election Officer, his Office, Lieutenant Governors before that, as well as others, had all been wrong, and that "blank ballots" were "ballots cast upon [the convention] question." Finding no relevance to past practice or the reasons for it, and not addressing problems that arise from imputing an intent to undecided voters who are forced by law to turn in "blank ballots," the court relied on perceived distinctions between the words "ballots cast upon [the] question" (which governs a convention call) and the term "votes tallied upon the question" (which governs, in part, amendment passage). 935 P.2d at 95-97.

The challenge for the view that a supermajority was needed to call a convention was far more difficult, however, and ultimately required literally assuming HRS § 11-137, and its century of enforcement, out of existence. The court acknowledged that imposing a supermajority requirement at the convention-call stage required viewing the term "ballots cast upon [the] question" as: (1) *different*, because of its "plain language," from the threshold requirement for amendment ratification ("votes tallied upon the question"), which all concede does not include blank ballots; (2) *different* in its language from the express supermajority provision for ratification of amendments

("the total vote cast at the election"), which all concede includes blank ballots; yet (3) *like* the supermajority provision for ratification of amendments in that it includes blank ballots in computing "a majority," 935 P.2d at 95. The court also believed that history and logic required showing that imposing a supermajority rule at the convention call stage would not necessarily make it harder to call a convention than to ratify amendments that came out of the convention. *Id.* The court found that its view of Article XVII, § 2 met these challenges, as illustrated by a hypothetical example that assumed that up to *forty thousand* Hawaii voters could take their ballot cards out of the polling place with no consequence. 935 P.2d at 97-98. As Respondents admitted in the District Court, *Yoshina* was for this reason "flawed" and "implausible" (Clerk's Docket 22 (resp. mem. at 8 n.6)).

C. Proceedings in the Federal Courts Below.

Petitioners, who were not parties to *Yoshina*, brought this suit pursuant to 42 U.S.C. § 1983 in the District Court on April 15, 1997, claiming that *Yoshina*'s retroactive enforcement violated their federal rights. Relying mainly on two analogous cases,[11] they sought two remedies: (1) an order directing Respondents to certify the 1996 plebescite as having passed; or (2) an order directing a new vote.

On July 10, 1997, on cross-motions for summary judgment, the District Court (Ezra, J.) granted the second

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[11] *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978), and *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1986).

requested remedy – a new vote.[12] *See* App. C. It did so after finding this case "closely analogous" to the Eleventh Circuit's decision in *Roe v. Alabama*, 43 F.3d 574 (11th Cir.), *cert. denied*, 116 S. Ct. 276 (1995), where the court held that a retroactive decision by the Alabama courts to allow unnotarized absentee ballots to be counted pursuant to the general principles of Alabama's "substantial compliance" doctrine amounted to an unconstitutional "retroactive change in the election laws that will effectively 'stuff the ballot box,' implicating fundamental fairness issues." 43 F.3d at 577, 578 n.6, 581 (citing *United States v. Saylor*, 322 U.S. 385, 389 (1944)). *See* Pet. App. at 68a. As Judge Ezra observed, *Roe* held fundamentally unfair, and invalid, the retroactive counting of unnotarized ballots without any specific evidence of reliance by the voters; past practice by state election officials was enough. As *Roe* stated, and as Judge Ezra agreed, "[w]e consider it unreasonable to expect average voters and candidates to question . . . the election officials' interpretation and application of the statute, especially in light of its plain language." 43 F.3d at 581, *quoted* Pet. App. 67a. Likewise, as Judge Ezra observed, it was irrelevant that the Alabama state court action purported to *en*franchise rather than *dis*enfranchise voters. *See* Pet. App. 68a & n.8. The Eleventh Circuit held, as a matter of judicial notice, that had it been known that the "substantial compliance" doctrine would render valid unnotarized absentee ballots, "campaign strategies would have taken this into account[.]" 43 F.3d at 582.

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[12] The District Court also certified the case as a class action. That certification has not been contested.

Judge Ezra held that these legal principles required a summary judgment for Petitioners. Citing extensive evidence of "past practice," including not only the conduct of election officials but "the information disseminated by the Chief Elections officer," "the prior opinion of the Attorney General," and the reasoning thereof, Judge Ezra found that "there would be no reason for voters to assume that their blank ballots would be counted as 'no' votes any more than they should assume that their blank votes would be counted as 'yes' votes." Pet. App. 68a-69a, 78a-79a. Judge Ezra found that the rights of those whose blank votes had been conscripted to the "no" side had been violated, and those who voted "yes" and "groups who had vigorously advocated for the con-con" "could have chosen different strategies or informed the public otherwise had they known before the election of the subsequent meaning attached to blank votes." *Id.* at 68a n.8. Thus, *Yoshina* violated "Plaintiffs' Fourteenth Amendment rights to due process." *Id.* at 77a.

As to remedy, Judge Ezra did not go so far as *Roe*. Whereas *Roe* ordered the seating of candidates defeated by the newly-announced rule, *see Roe v. Alabama*, 68 F.3d 404 (11th Cir. 1995), Judge Ezra believed it improper to direct "the calling of a state Constitutional Convention based upon an election held in violation of the Hawaii Supreme Court's interpretation of the State Constitution." Pet. App. 84a. Instead, he ordered only "a new election." *Id.* at 85a.

The Ninth Circuit granted a full stay (*id.* at 103a), and reversed (*id.* at 45a-46a). The panel opinion (Tashima, J., joined by Wiggins, and Noonan, JJ.) conceded, however, that "[p]rior to 1996, machine-counted ballots that left the

convention question blank were simply ignored in computing whether the convention question had passed. 'Yes' votes were counted against 'no' votes, and the majority ruled." *Id.* at 30a. It agreed that the "information sheets" "present at every polling place" failed to give any "significance" to "blank ballots," and that the Office of Elections "fact sheet" was affirmatively false. *Id.* It agreed that the Citizens group was falsely told "that blank ballots would not be counted on the convention question." *Id.* at 31a. It recognized that Plaintiffs who returned blank ballots had alleged (they also swore) "that they had abstained on the convention question, but that if they had known that not voting had the same effect as voting 'no,' they would have voted differently." *Id.* at 33a. The court noted that voters could not "remove their ballots from the polling place." *Id.* at 44a n.5.

While purporting to distinguish *Roe*, the Ninth Circuit effectively gutted it. The Eleventh Circuit, relying on this Court's longstanding view – dating to *United States v. Classic*, 313 U.S. 299, 309 (1941) – that "ballot stuffing" violates the Constitution, found that due process was breached based on the judicially noticeable fact that, had the vote-counting rules been known, "campaign strategies would have taken this into account." 43 F.3d at 581-82. The Ninth Circuit, by contrast, almost insultingly described voters who returned blank ballots as individuals who "did not care or did not care enough" to express a choice (Pet App. 43a), never addressing the point raised by *Roe*, namely, that if those voters *knew* returning a blank ballot meant voting "no," they "would have taken this

into account . . . and would have voted" with that knowledge. 43 F.3d at 582. Never acknowledging *Yoshina*'s retroactivity was federally worse than in *Roe*, in that it was not evenhanded, and conscripted unconsenting voices in a content-based way for one side of an issue, the panel found "no disenfranchisement or meaningful vote dilution." Pet. App. 43a.[13]

The panel widened the conflict by expansively interpreting *Partido Nuevo Progresista v. Barreto-Perez*, 639 F.2d 825 (1st Cir. 1980), which no party cited and which *Roe* limited to its facts. 43 F.3d at 582. Though *Barreto-Perez* upheld a refusal to punish voters whose ballots were defective because officials placed a certification mark in the wrong place, and is a ruling barring forfeiture of voters' rights due to official mistakes, the panel seized on the fact that "*more* votes than had previously been permitted" were counted in *Barreto-Perez*, rather than the *reasons* why "more votes" were counted. Pet. App. 41a.

Also, while purporting to follow *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) – *Barreto-Perez*' precursor – the panel employed presumptions at odds with those in *Griffin*. *Griffin* held retroactive rule changes for "a potentially controlling number" of absentee ballots required a

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[13] Rather than address the First Amendment considerations amplifying the invalid nature of Hawaii's retroactive rule-change, the panel simply recast Petitioners' First Amendment claims as a challenge to *Yoshina*'s enforcement in future elections. Pet. App. 43a-44a. Recast in this manner, Petitioners' First Amendment claims were brushed aside as an attack on this Court's decision in *Gordon v. Lance*, 403 U.S. 1 (1971), which holds that supermajority requirements are not facially invalid – a point no one even remotely attacks here.

new vote. 570 F.2d at 1080. The First Circuit relied on testimony by a few class members, not chosen at random, to support a "presumption" in light of "the 'nature of the right to vote' " that "all class members would have made [different] arrangements" (voting in person) "had they known this would be the only way" to express their view. *Id.* at 1068. Although this reasoning supported relief here, the panel limited *Griffin* to its facts, focusing on the mere formal difference here that the Hawaii voters who returned blank ballots were physically at the polls, and ignoring the fact that, as in *Griffin*, Hawaii voters had no notice of the rule-change (here that "blanks" were "noes"). Pet. App. 41a. Describing *Griffin*, which involved only absentees, as involving "massive disenfranchisement," the panel overlooked that *Yoshina* effected a change in tens of thousands of votes, holding there was "no disenfranchisement." *Id.* 43a. Because the panel concluded that *Yoshina* "did not violate any voter's free speech or substantive due process rights," any issue of remedy was moot. Pet. App. 45a-46a.

On June 23, 1998, the panel denied rehearing. *See* App. N.

D. Act 131 and Petitioners' Post-Mandate Motions.

Act 131 (Pet. App. 270a) was signed June 22, 1998. On July 7, 1998, Petitioners filed with the panel a suggestion of partial mootness, and motions (1) to transfer their claim for fees and costs to the trial court, or for award of fees on appeal, (2) to recall the mandate, and (3) to vacate the judgment. Pet. App. 178a.

Petitioners' fee claim[14] relies on an unbroken line of Ninth Circuit cases, cases in other circuits, and, ultimately, *Maher v. Gagne*, 448 U.S. 122 (1980), which recognized Congress's intent, in enacting 42 U.S.C. § 1988, that " 'for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.' " 448 U.S. at 129. The Ninth Circuit's test for a "catalyst" award poses two hurdles: (1) "whether the lawsuit was causally linked to the relief actually obtained" and (2) whether the underlying claim had a "legal basis" – i.e., was not " 'frivolous, unreasonable or groundless.' " *Sablan v. Department of Finance*, 856 F.2d 1317, 1325 (9th Cir. 1988). This test is virtually identical to that in every other circuit that recognizes the "catalyst" theory and draws for its support on *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978), a leading decision construing § 1988. Petitioners submitted below evidence that "the lawsuit was causally linked to the relief actually obtained," and argued their suit was not "frivolous." Pet. App. 190a-195a (mem.), 218a-241a, 280a-282a (evidence).[15]

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[14] Petitioners requested $93,778.15 in fees and costs. *Id.* at 216a. Accrued fees and costs have predictably increased since the July 7, 1998, petition was filed.

[15] This evidence included: (1) inaction by Respondents prior to the entry of summary judgment against them; (2) introduction, "by request," of HB 3130 on January 28, 1998, after argument below; (3) House testimony that drew attention to Mr. Yoshina's admissions; (4) statements in the House report chronicling the history of the suit, connecting that history to the need to "place this question on the ballot," and noting Mr. Yoshina's testimony in support; (5) an uncontradicted House

Respondents' opposition (App. Q) argued that the "basis in law" hurdle for a § 1988 recovery was not met because the Ninth Circuit's initial opinion resolved the legal issues involved and, hence, despite the fact that a petition for rehearing and suggestion of the appropriateness of rehearing en banc were pending, and this Court's review had not even been sought, Act 131 was "gratuitous." Pet. App. 252a-253a. Respondents also raised factual arguments re: the connection between the lawsuit and Act 131, and stated Petitioners' claim for a new election was not moot, and that vacatur was unwarranted under *U.S. Bancorp v. Bonner Mall Partnership*, 513 U.S. 18 (1994), as Petitioners supported Act 131's passage. Pet. App. 254a-269a.

The Ninth Circuit has not addressed these claims.

REASONS FOR GRANTING THE WRIT

This case concerns, and has affected, the very essence of constitutional democracy in the Fiftieth State. Perhaps more important, left to stand, the Ninth Circuit's vast expansion of the power of the States retroactively to

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floor statement by Representative Kawananakoa, who, after citing Judge Ezra's ruling, stated, "[s]o here we are today, passing this measure"; (6) Senate testimony noting the panel's concessions; (7) Senate report language citing the same "controversy" and "ensuing debate regarding placing the question before the voters" as were referenced in the House report; (8) the Governor's decision to sign the bill rather than merely allow it to become law without signature; and (9) the Governor's early signing of the bill.

change the rules governing the counting of votes leaves the law of Due Process mired in intractable inter-circuit conflicts.

The panel also lost sight of core principles this Court has enunciated for more than fifty years in decisions protecting the fairness of state elections. From the rule that citizens are entitled "to have their votes counted as cast," *United States v. Classic*, 313 U.S 299, 309 (1941), to the principle that voters must have the ability "to act in a timely fashion" under state election laws, *Burdick v. Takushi*, 504 U.S. 428, 438 (1992), this Court's precepts will mean little if the decision below is left undisturbed.

Perhaps most critically, the Ninth Circuit's decision is now potentially a mere "advisory opinion." Whatever the panel's reasons for not awaiting the Governor's action on HB 3130, that bill is now law, and Respondents' appeal is moot. Petitioners' cross-appeal has been reshaped (and may itself be mooted by the November election), and there is a substantial claim of entitlement to fees and costs as to which Petitioners have a Due Process right to have heard on the merits in the courts below. Under *Lawrence v. Chater*, 516 U.S. 163 (1996), the petition should be granted, the judgment should be vacated, and the case remanded for further consideration in light of the effect of Act 131, its history, and the vote it directs November 3, 1998, or with such other instructions as are appropriate. Alternatively, the Court should grant plenary review as to Question 2.

A. In Light of the Enactment of Act 131, the Court Should Grant the Petition, Vacate the Judgment, and Summarily Remand for Further Consideration in Light of the Effect of Act 131 on Petitioners' Claims for Equitable Relief as Well as Fees and Costs.

A GVR order is proper here. As *Lawrence* states:

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate. Whether a GVR order is ultimately appropriate depends further on the equities of the case: if it appears that the intervening development, such as a confession of error in some but not all aspects of the decision below, is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate.

516 U.S. at 167-68. Here, Act 131 became law only one day before rehearing and en banc review were denied. The Ninth Circuit expressly refused to await the Governor's action, and refused to permit an amended petition for rehearing.

There is more than a reasonable probability that the panel would alter its disposition on remand. Respondents' appeal from the order directing (and the claim for)

a new vote is moot. Here, federal courts may grant only prospective relief. *See Papasan v. Allain*, 478 U.S. 265 (1986). Petitioners asked for one new vote. They got one.

That the panel's liability ruling, if reinstated, could dispose (albeit erroneously) of Petitioners' cross-appeal, does not counsel against a GVR order. Even if the November vote does not moot the cross-appeal, this Court has long emphasized the importance in election cases of granting a legislature "an opportunity to remedy" a federal breach. *See Reynolds v. Sims*, 377 U.S. 533, 586 (1964). Here, the Legislature *did* adopt a remedy, making this case in this sense unique among those in this area to have reached the courts of appeals. The panel may well decide on remand that it is not necessary to reach the issue of liability because the remedy suffices even if there is a federal wrong. Such a disposition would sharply limit the impact of this case. The panel could also reconsider its liability ruling, either as a general matter,[16] or in light of the claim that *Yoshina* so clearly upset expectations that the Legislature nullified it in part. Indeed, Respondents argued in 1997 that the State's failure (then) "to undo the decision" distinguished this case from those where federal relief was granted.[17]

A GVR order would also be appropriate to lift any obstacle to review of Petitioners' claim for attorneys' fees (and for vacatur of the costs taxed *against* them). To date, that claim, which came into being only on June 22, has

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[16] *See Johnson v. Chicago Board of Educ.*, 457 U.S. 52, 53-54 (1982) (per curiam).

[17] *See* Resp. Supp. Br. at 4 n.3, No. 97-16408 (9th Cir. Dec. 23, 1997) (purporting to distinguish *Griffin*).

not been heard by *any* court, despite the Due Process entitlement to a hearing on its merits. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). Although the panel has had the power to recall the mandate, and has been apprised of the Due Process claim counseling it to act (Pet. App. 199a-206a), the court has yet to do so.[18] A GVR order would dispel the unconstitutional "limbo" in which the fee claim now floats.[19] A GVR is plainly appropriate in this case.[20]

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[18] As has the District Court. *See* Pet. App. 127a-128a.

[19] Neither the circuit conflict over the vitality of the "catalyst" theory of § 1988 recovery, nor Respondents' claim under the "basis in law" hurdle for such a recovery counsel against a GVR order on this front. *See Lawrence*, 516 U.S. at 172-73. The court below, like the majority of circuits, still grants "catalyst" fees, *see Kilgour*, 53 F.3d at 1010, and Respondents' "basis in law" argument is sufficiently novel that there is a "reasonable probability" the panel would reject it. Indeed, because that argument writes not only the rehearing process but *this* Court out of the enforcement scheme envisioned by § 1988, and seeks to term "frivolous" the substantial merits claims here, the likelihood of its rejection is clearly higher. Respondents' remaining claims against a fee award are factual in nature, and should be resolved on a remand.

[20] Although it would not appear necessary at this time, the Court may wish to instruct the panel more specifically. For example, Respondents' appeal is clearly moot, and the ordinary disposition in such a case should follow: dismissal of Respondents' appeal, vacatur of the judgment of the District Court adverse to Respondents, and dismissal of the claim for a new vote. *See United States v. Munsingwear*, 340 U.S. 36, 39 (1950). Act 131 was clearly not a "voluntary act" by Petitioners within the meaning of *U.S. Bancorp v. Bonner Mall*, 513 U.S. 18 (1994). Only the Legislature and Governor had the power to enact Act 131. If any party voluntarily extinguished the Article III "controversy" over the new vote, it was Respondents.

B. In the Alternative, the Court Should Grant Plenary Review to Correct the Ninth Circuit's Unprecedented Expansion of the States' Ability Retroactively to Alter Vote Counting Rules, or, Alternatively, to Resolve the Substantial Inter-Circuit Conflict Over the Ongoing Vitality of the § 1988 "Catalyst" Theory and Vindicate Petitioners' Due Process Rights to A Hearing on Their Claim for Attorneys Fees and Costs.

If the Court does not dispose of this case summarily, plenary review should be granted both as to the merits issues remaining, as well as to the "catalyst" fee issue.

First, despite the panel's efforts to bury them, the ruling below creates gaping inter-circuit conflicts. On the one hand, the First Circuit in *Griffin* expansively acknowledged, based on "the 'nature of the right to vote,' " possible changes in electoral outcome based on voters' lack of knowledge of unannounced rule changes (or, even, clarifications), *see* 570 F.2d at 1068 n.4, and the Eleventh Circuit, in *Roe* held, based on nothing more than "judicial notice," that Due Process was breached if "campaign strategies would have taken [the substance of a post-election court ruling] into account." 43 F.3d at 581-82. By contrast, here the Ninth Circuit's denigrating "caveat emptor" view that those who returned blank ballots "did not care or did not care enough" authorizes the States to ascribe significant electoral meaning, after-the-fact, to previously-understood inconsequential election-day acts virtually at will. Indeed, as their conflicting

readings of *Barreto-Perez* make clear, the Ninth and Eleventh Circuits are now at complete loggerheads in this critically important Due Process area.[21]

The panel ruling also departs from this Court's teachings. Americans have long enjoyed a federal right "to have their votes counted as cast," *United States v. Classic*, 313 U.S. 299, 309 (1941). Though this case does not literally involve physical ballot stuffing, the wrong is similar. Indeed, this Court has deferred to state election laws that are predicated on the ability of voters "to act in a timely fashion" *under* those laws. *Burdick v. Takushi*, 504 U.S. 428, 438 (1992).[22] Where, as here, rules central to how votes will count are announced after-the-fact, there is no such ability and deference is unwarranted.[23] If the Court does

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[21] The decision below also conflicts, in principle, with *Hendon v. North Carolina State Bd. of Elec.*, 710 F.2d 177 (4th Cir. 1983), which nullified an automatic "straight-ticket" deeming rule that counted votes for party candidates even when a voter, by making additional marks on the ballot, "indicated no such preference." *Id.* at 180. Here, as in *Hendon*, those returning blank ballots indicated "no such preference" for the "no" position, yet without notice were cast in that group.

[22] *See Munro v. SWP*, 479 U.S. 189 (1986); *Norman v. Reed*, 502 U.S. 279 (1992); *Storer v. Brown*, 415 U.S. 724 (1974); *American Party of Texas v. White*, 415 U.S. 767 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971).

[23] Even though Hawaii has remedied *Yoshina*'s wrong in part, it has not unstuffed the 1996 ballot box. Here again, review is warranted, in that the Eleventh Circuit's approach does not permit state officials "one free unfair election." *See Roe v. Alabama*, 68 F.3d 404, 406 (11th Cir. 1995). If a summary order is not appropriate, there is sufficient conflict on the issue of remedy so as to warrant review of the remedial issue.

not dispose of this case summarily, it should still grant review for this reason.

Even if the remaining merits issue does not warrant review, Petitioners' claim for "catalyst" fees does. Even though Petitioners met § 1988's requirements by " 'vindicat[ing] rights . . . without formally obtaining relief,' " *Maher*, 448 U.S. at 129, they have been ordered by the Ninth Circuit to pay *Respondents'* costs, in plain breach of the "catalyst" theory. This case thus poses the issue whether, as a matter of law, the "catalyst" theory remains viable after *Farrar v. Hobby*, 506 U.S. 103 (1992), a point on which the circuits are in conflict, with the Third, Fifth, Seventh, Eighth, and Tenth Circuits holding that the "catalyst" theory survives *Farrar* and the Fourth Circuit holding that it does not. *See Kilgour v. City of Pasadena*, 53 F.3d 107, 1010 & nn. 2-3 (9th Cir. 1995). Moreover, the fact that the assessment of costs against Petitioners violates § 1988, and Petitioners' inability to obtain an adjudication from the courts below on Petitioners' affirmative claims for fees and costs, constitutes an unconstitutional deprivation of Petitioners' claim of entitlement under § 1988 that itself warrants review under *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982).

CONCLUSION

For the reasons above, the petition for certiorari should be granted, the judgment should be vacated, and the case remanded to the Court of Appeals for further consideration of Petitioners' claims for equitable relief, attorneys fees, and other costs, in light of Act 131, its

history, and the vote to be had on November 3, 1998, or with such other instructions as the Court finds appropriate.

In the alternative, the Court should grant plenary review as to the second question presented.

Respectfully submitted,

STEVEN SCOTT MICHAELS*
*Counsel of Record
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, NY 10022
(212) 909-7265

MARK J. BENNETT
McCORRISTON MIHO MILLER MUKAI
Five Waterfront Plaza
Honolulu, HI 96813
(808) 529-7300

Counsel for Petitioners

October 21, 1998.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARK J. BENNETT; CHARLES S. FRUMIN; BOBBY CARINIO; MARK R. SPENGLER; LET THE PEOPLE DECIDE; CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves and others similarly situated, and JERRY BECK, *Plaintiffs-Appellees,* v. DWAYNE D. YOSHINA, Chief, Elections Officer of the State of Hawaii; Office of Elections; MAZIE K. HIRONO, Lieutenant Governor of the State of Hawaii, and; BENJAMIN J. CAYETANO, Governor of the State of Hawaii, in their official capacities, *Defendants-Appellants.*	No. 97-16408 D.C. No. CV 97-0322 DAE

MARK J. BENNETT; CHARLES S. FRUMIN; BOBBY CARINIO; MARK R. SPENGLER; LET THE PEOPLE DECIDE; CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves and others similarly situated, and JERRY BECK, *Plaintiffs-Appellants,* v. DWAYNE D. YOSHINA, Chief, Elections Officer of the State of	No. 97-16543 D.C. No. CV 97-0322 DAE

Hawaii; Office of Elections; MAZIE K. HIRONO, Lieutenant Governor of the State of Hawaii, and; BENJAMIN J. CAYETANO, Governor of the State of Hawaii,

Defendants-Appellees.

and

HAWAII STATE AFL-CIO; GARY W. RODRIGUES; RUSSELL OKATA; KEITH AHUE; JACKIE FERGUSON-MIYAMOTO; DONALD ABDUL; NILDA CHOCK; CLAYTON DELA CRUZ; GUY FUJIMURA; CARMELA GOMEZ; LEONARD HOSHIJO; JONATHAN KANE; MARK MATSUMOTO; STUART MCKINLEY; RICHARD RUTT; LAWRENCE SAKAMOTO; HOWARD TASAKA; PETER TRASK; ADALINE UHRLE; GEORGE YASUMOTO; MICHAEL AMII; DENNIS CHANG; PATRICIA A. CHOW; GAREN R. DEWEESE; LESLIE ANNE DEWEESE; JAN DOI; ROBERT DOI; MELVIN FONG; KIMBERLY HAINES; WILLIAM HOSHIJO; MARSHA R. JOYNER; CALVIN KOSEKI; LEIMALAMA LEE LOI; ROBERT MATSUNAKA; LAVERNE MOORE; JANETTE M. NAGAO; ROBERT H. NAGAO; CRAIG NAHM; AYAKO NAKANISHI; DOUGLASS PANG; LARRY SAKOKA; ETHEL SHINTAKU; ANDREI SOTO; GEORGE THOMAS; LEILANI THOMAS; LINDA N. THOMAS; JEANINE TSUCHIYA; MAUREEN WAKUZAWA; HARRY WOOD; LANA YOUNG,

Defendants-Intervenors-Appellees.

MARK J. BENNETT; CHARLES S. FRUMIN; BOBBY CARINIO; MARK R. SPENGLER; LET THE PEOPLE DECIDE; CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves and others similarly situated, and JERRY BECK,

Plaintiffs-Appellees,

v.

DWAYNE D. YOSHINA, Chief, Elections Officer of the State of Hawaii; Office of Elections; MAZIE K. HIRONO, Lieutenant Governor of the State of Hawaii, in their individual capacities; OFFICE OF ELECTIONS; BENJAMIN J. CAYETANO, Governor of the State of Hawaii,

Defendants,

and

HAWAII STATE AFL-CIO; GARY W. RODRIGUES; RUSSELL OKATA; KEITH AHUE; JACKIE FERGUSON-MIYAMOTO; DONALD ABDUL; NILDA CHOCK; CLAYTON DELA CRUZ; GUY FUJIMURA; CARMELA GOMEZ; LEONARD HOSHIJO; JONATHAN KANE; MARK MATSUMOTO; STUART MCKINLEY; RICHARD RUTT; LAWRENCE SAKAMOTO; HOWARD TASAKA; PETER TRASK; ADALINE UHRLE; GEORGE YASUMOTO; MICHAEL AMII; DENNIS CHANG; PATRICIA A. CHOW; GAREN R.

No. 97-16540

D.C. No.
CV 97-0322 DAE

DEWEESE; LESLIE ANNE DEWEESE; JAN DOI; ROBERT DOI; MELVIN FONG; KIMBERLY HAINES; WILLIAM HOSHIJO; MARSHA R. JOYNER; CALVIN KOSEKI; LEIMALAMA LEE LOI; ROBERT MATSUNAKA; LAVERNE MOORE; JANETTE M. NAGAO; ROBERT H. NAGAO; CRAIG NAHM; AYAKO NAKANISHI; DOUGLASS PANG; LARRY SAKOKA; ETHEL SHINTAKU; ANDREI SOTO; GEORGE THOMAS; LEILANI THOMAS; LINDA N. THOMAS; JEANINE TSUCHIYA; MAUREEN WAKUZAWA; HARRY WOOD; LANA YOUNG,

Defendants-Intervenors-Appellants.

MARK J. BENNETT; CHARLES S. FRUMIN; BOBBY CARINIO; MARK R. SPENGLER; LET THE PEOPLE DECIDE; CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves and others similarly situated, and JERRY BECK,

Plaintiffs-Appellees,

v.

DWAYNE D. YOSHINA, Chief, Elections Officer of the State of Hawaii; Office of Elections; MAZIE K. HIRONO, Lieutenant Governor of the State of Hawaii,

and; BENJAMIN J. CAYETANO, Governor of the State of Hawaii in their official capacities; OFFICE OF ELECTIONS,

Defendants,

and

HAWAII STATE AFL-CIO; GARY W. RODRIGUES; RUSSELL OKATA; KEITH AHUE; JACKIE FERGUSON-MIYAMOTO; DONALD ABDUL; NILDA CHOCK; CLAYTON DELA CRUZ; GUY FUJIMURA; CARMELA GOMEZ; LEONARD HOSHIJO; JONATHAN KANE; MARK MATSUMOTO; STUART MCKINLEY; RICHARD RUTT; LAWRENCE SAKAMOTO; HOWARD TASAKA; PETER TRASK; ADALINE UHRLE; GEORGE YASUMOTO; MICHAEL AMII; DENNIS CHANG; PATRICIA A. CHOW; GAREN R. DEWEESE; LESLIE ANNE DEWEESE; JAN DOI; ROBERT DOI; MELVIN FONG; KIMBERLY HAINES; WILLIAM HOSHIJO; MARSHA R. JOYNER; CALVIN KOSEKI; LEIMALAMA LEE LOI; ROBERT MATSUNAKA; LAVERNE MOORE; JANETTE M. NAGAO; ROBERT H. NAGAO; CRAIG NAHM; AYAKO NAKANISHI; DOUGLASS PANG; LARRY SAKOKA; ETHEL SHINTAKU; ANDREI SOTO; GEORGE THOMAS; LEILANI THOMAS; LINDA N. THOMAS; JEANINE TSUCHIYA; MAUREEN WAKUZAWA; HARRY WOOD; LANA YOUNG,

Defendants-Intervenors-Appellants.

No. 97-16596

D.C. No. CV 97-0322 DAE

Appeals from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding

Argued and Submitted
January 16, 1998 – San Francisco, California

Filed March 27, 1998
Amended June 23, 1998

Before: Charles Wiggins, John T. Noonan, and
A. Wallace Tashima, Circuit Judges.

OPINION

TASHIMA, Circuit Judge:

This case presents a constitutional challenge to a vote put to the citizens of Hawaii on November 5, 1996. Plaintiffs ask us to invalidate the vote on the ground that the Hawaii Supreme Court's interpretation of blank ballots was so unforeseeable that the voters' substantive due process and free speech rights were violated. We reject this constitutional challenge and uphold the Hawaii vote.

I.

The vote at issue was on a question asking Hawaii voters whether they wished to hold a convention that would propose amendments to the Hawaii state constitution. The constitutional convention question was one of several unrelated items on the general ballot, including ratification votes on three proposed state constitutional amendments.

By way of background, amendments to the Hawaii constitution can be proposed either by the legislature or

by a convention. Haw. Const. art. XVII, § 1. The Hawaii Constitution states:

> The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the constitution?" If any nine-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period.

Haw. Const. art. XVII, § 2. Amendments proposed by the convention must then be ratified by the people. *Id.* Pursuant to Haw. Const. art. XVII, § 2, voters were asked in 1966, 1976, 1986 and 1996 whether they wished to hold a constitutional convention.

Prior to 1996, machine-counted ballots that left the convention question-blank were simply ignored in computing whether the convention question had passed. "Yes" votes were counted against "no" votes, and the majority ruled.

In preparation for the 1996 vote, the Office of Elections distributed an "information sheet" that was present at every polling place. The sheet explained the significance of a "yes" vote and a "no" vote, but was silent on what happened to blank ballots. Additionally, a few days before the election, the Office of Elections printed a "fact sheet" that said that a majority on the convention question would be determined without considering blank ballots. This fact sheet was available at the Office of Elections to be picked up, and some voters did so. The fact sheet was also available on the internet, although

only a small number of "hits" occurred at this internet site.

At some point before the 1996 vote – it is unclear exactly when – the Office of Elections told Citizens for a Constitutional Convention ("Citizens") that blank ballots would not be counted on the convention question. Citizens is an organization that lobbied Hawaii voters in favor of the convention question, and it claims to have changed its campaign strategy in reliance on the Office of Elections' instruction.

At the November 5 election, the electorate voted (or failed to vote) on the constitutional convention question, as follows: 163,869 voters marked "yes"; 160,153 marked "no"; 45,245 left the question blank; and 90 marked both "yes" and "no." Thus, if blank ballots are counted, they control the outcome of the vote.

Shortly after the election, the Hawaii State AFL-CIO[1] sued Dwayne D. Yoshina, the Chief Elections Officer of Hawaii,[2] in an original action in the Hawaii Supreme Court. The AFL-CIO sought a declaratory judgment that the constitutional convention question had failed and an order directing Yoshina to certify that it had failed. The Hawaii Supreme Court ruled in favor of the AFL-CIO. *Hawai'i State AFL-CIO v. Yoshina*, 935 P.2d 89, 98 (Haw. 1997) (*"Yoshina I"*).

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[1] The Hawaii State AFL-CIO was joined by 51 individually named plaintiffs in the state suit, but for convenience we refer only to the AFL-CIO.

[2] As in this case, several other defendants were also named. For convenience, we refer to them collectively as "Yoshina."

The court noted that Haw. Const. art. XVII, § 2, required a constitutional convention only if the question received a majority of the "*ballots* cast upon such a question." (Emphasis added.) Once a convention is convened, however, and amendments are proposed to the voters, the amendments pass if they receive "a majority of the *votes tallied* upon the question." Haw. Const. art. XVII, § 2 (emphasis added). The court noted the difference in language and pointed to a committee report from the 1950 constitutional convention that indicated that the difference in language had been intentional. *Yoshina I*, 935 P.2d at 95. Therefore, the court concluded that "ballots cast" included all submitted ballots that contained the question, while "votes tallied" meant only the "yes" or "no" votes (*i.e.*, blank ballots operated *against* the convention question). *Id.* at 96. Because in the 1996 convention vote, the "yes" votes did not constitute a majority of the total "ballots cast" (as the Hawaii Supreme Court understood that term), the court ordered Yoshina to certify that the question had failed. *Id.* at 98.

Three weeks after the Hawaii Supreme Court's ruling, Mark J. Bennett, Citizens for a Constitutional Convention, Let the People Decide, and several individual plaintiffs commenced this action. Some of the individuals alleged that they had abstained on the convention question, but that if they had known that not voting had the same effect as voting "no," they would have voted differently. The other individuals voted "yes," and the institutional plaintiffs alleged that their members mostly voted "yes" on the convention question. Plaintiffs (collectively, "Bennett") argued that the Hawaii Supreme Court's decision in *Yoshina I* was an unforeseeable departure from

past election practices and was unconstitutional, primarily for lack of notice.

The Hawaii State AFL-CIO and 49 individually named plaintiffs (collectively "applicants" or "AFL-CIO") filed a motion to intervene in the case. The applicants – all parties to *Yoshina I* – claimed to have an ideological interest in the outcome of the case, as well as an interest in protecting their victory in state court. The motion to intervene was denied.

On cross-motions for summary judgment, the district court ruled for plaintiffs. It found that plaintiffs had standing, and granted their motion for class certification, rulings that are not contested on appeal. The court concluded that federal jurisdiction existed in this case, rejecting the *Rooker/Feldman* doctrine (*see District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923)) and the Eleventh Amendment as jurisdictional bars. Finally, the district court concluded that the constitutional convention vote had been fundamentally unfair because the Hawaii Supreme Court's opinion marked a departure from prior election practices, was unforeseeable to the average voter because it contradicted the previously understood election procedures, and contradicted information that the state itself had disseminated before the election. The court then ordered that a new election take place.

Everyone appeals. In No. 97-16408, Yoshina appeals the ruling that the Eleventh Amendment does not bar this suit, the conclusion that the convention vote was fundamentally unfair, and the order to conduct a new election. In No. 97-16543, Bennett cross-appeals the district court's

decision to order a new election, instead of requiring Hawaii to certify that the constitutional convention question passed. In Nos. 97-16540 and 97-16596, the AFL-CIO appeals the denial of its motion to intervene.

II.

Before we can reach the merits, we must overcome two jurisdictional hurdles. The first is the *Rooker/Feldman* doctrine, which holds that "a losing party in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States District Court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994). The rationale behind this doctrine is that the only federal court with the power to hear appeals from state courts is the United States Supreme Court. *Dubinka v. Judges of Sup. Ct.*, 23 F.3d 218, 221 (9th Cir. 1994).

We agree with the district court that the doctrine is not implicated in this case because it applies only when the federal plaintiff was a party to the state suit. *Johnson*, 512 U.S. at 1006. Here, the federal plaintiffs were not parties to the state suit. That case was between the AFL-CIO and Yoshina. Yoshina lost, and the referendum was decreed to have failed. Then a coalition of entirely new people sued Yoshina in federal court, and Yoshina is now in the position of having to defend his defeat in state court. However, since the new plaintiffs were not parties to the state suit, their suit is not barred by the *Rooker/Feldman* doctrine.

The only twist is that two of the federal plaintiffs, Citizens for a Constitutional Convention and Let the People Decide, participated in the state case as amici curiae. Amici, however, are not actually parties to a case, cannot conduct discovery, and do not have the right to appeal an adverse decision. Since the *Rooker/Feldman* doctrine applies only when the federal plaintiff was a party to the state case and is challenging an adverse decision by the state court, *Johnson*, 512 U.S. at 1005-06, it follows that mere participation in the state case as amici does not invoke the *Rooker/Feldman* bar. *Exxon Corp. v. Bd. of Ed. of Lamar County*, 849 F. Supp. 479, 487 (S.D. Miss. 1994), *aff'd*, 68 F.3d 472 (5th Cir. 1995) (per curiam). Accordingly, we conclude that the *Rooker/Feldman* doctrine does not apply.

We are likewise unpersuaded by Yoshina's argument that we lack jurisdiction because of the Eleventh Amendment. The Amendment is understood to bar suits by a person against a state on questions of federal law. *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1122 (1996). However, an exception exists for a suit that seeks prospective relief from a state's ongoing constitutional violation, provided it names a state official as the defendant. *Edelman v. Jordan*, 415 U.S. 651, 664-66 (1974); *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

Yoshina argues that no ongoing constitutional violation exists, reasoning that the November 5, 1996, election has already taken place and whatever problems may have occurred are unlikely to be repeated. In effect, Yoshina argues that completed state election mishaps can never be reviewed in federal court because once the election has occurred, any relief would be retrospective. The flaw in

this argument is Yoshina's unduly narrow conception of the alleged constitutional injury. If, after ruling that blank ballots counted against the convention question, the Hawaii Supreme Court had also decided that it was unfair to surprise voters with this new rule and ordered a new election, we do not suppose that Bennett would have troubled himself with a federal lawsuit. What Bennett objects to is not the mere occurrence of an allegedly unfair vote, but the state's decision *to give effect* to that vote. And obviously, the legal effectiveness of the 1996 vote – *i.e.*, whether a constitutional convention will take place – is something that will, or will not, happen in the future. Thus, we conclude that Bennett seeks prospective, not retrospective, relief. *Cf. Goodisman v. Lytle*, 724 F.2d 818, 820 (9th Cir. 1984) (holding that Eleventh Amendment does not bar a suit by a public employee seeking reinstatement, despite the fact that the unconstitutional termination was already completed).

Further, a decision by this court that the Eleventh Amendment bars this suit would be contrary to the decisions of several other circuits which, while not explicitly addressing the Eleventh Amendment, decided the constitutionality of completed election errors. *E.g., Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995); *Curry v. Baker*, 802 F.2d 1302 (11th Cir. 1986); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978). While these cases did not directly confront the Eleventh Amendment question we decide today, we decline to suggest that those other courts acted in the absence of federal jurisdiction. Accordingly, we reject Yoshina's Eleventh Amendment argument.

Having surmounted the jurisdictional barriers, we now turn to the merits.

III.

Bennett makes two broad constitutional attacks on the 1996 convention vote. First, he argues that *Yoshina I* was a totally unforeseeable interpretation of the state's election laws and, therefore, amounted to a denial of substantive due process. Conceding that the Hawaii Supreme Court is the ultimate arbiter of Hawaii law and that the court had never before ruled on whether blank ballots counted in a constitutional convention vote, Bennett nonetheless argues that the past election practice was sufficiently clear that voters were unfairly surprised by *Yoshina I*. He also points to the misinformation distributed by the state as evidence of the voters' surprise.

Second, Bennett argues that counting blank ballots as votes against the constitutional convention question violates the First Amendment. He contends that the Hawaii Supreme Court effectively re-wrote voters' abstentions into "no" votes and that this rewriting amounted to unconstitutionally coerced speech.

We first postulate two assumptions that must guide the constitutional inquiry before us. First, states have considerable freedom to design their own election laws. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The Supreme Court has long held that the structure of a state's internal democratic processes is a "political question" beyond the ken of judicial review. *Baker v. Carr*, 369 U.S. 186, 218-226 (1961) (citing cases). Although federal courts may invalidate state election laws that deny some voters equal protection of the law, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), unduly burden free speech, *Anderson v. Celebrezze*, 460 U.S. 780, 788-90 (1983), or violate a federal statute,

Foster v. Love, 118 S. Ct. 464, 467 (1997), we must normally defer to the states' regulatory interests when these federal rights are not implicated. *Cf. Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364, 1369 (1997) (recognizing states' regulatory interests).

Second, the Hawaii Supreme Court is by definition the final arbiter of Hawaii law. *Johnson v. Fankell*, 117 S. Ct. 1800, 1804 (1997). We are powerless to review that court's decision in *Yoshina I*, even if we thought it was wrong or contrary to general principles of election laws. Insofar as Bennett's suit is a backhanded critique of the merits of *Yoshina I*, we should be clear that we are unwilling and unable to indulge this.

With these general principles in mind, we now turn to Bennett's constitutional claims.

A.

Bennett's first claim is that Hawaii's unforeseeable departure from past election practices was a denial of substantive due process.

In *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997) (en banc), we recently considered what restraints due process places on a state's election laws. In *Bates*, we upheld a California term limits initiative against the claim that the initiative "did not provide California voters with sufficient notice that the Proposition imposed lifetime limits" on officeholders. *Id.* at 846. We assumed, "without deciding, that a federal court may determine whether a state has given adequate notice to its voters in connection with a statewide initiative ballot measure. . . . " *Id.* We then

concluded that adequate notice existed, assuming any was needed. *Id.*

We agree with Bennett that *Bates* does not resolve the substantive due process claim in this case. First, *Bates* did not actually decide whether voters must receive notice of what they are voting on – it merely assumed so *arguendo.* Second, the notice at issue in *Bates* is of a completely different kind from the notice at issue in this case. In *Bates,* the court dealt with whether voters had adequate notice of the substantive content of what they were voting on. The lack-of-notice argument asserted that federal courts could strike down voter initiatives whenever voters did not receive sufficient notice to understand what they were voting for or against. We deal here with a more modest due process claim. Bennett challenges only Hawaii's election procedures, and he argues only that voters need to understand *that they are voting,* not that the state must inform them of the substance of what they are voting on, or anything else. Thus, unlike *Bates,* this case concerns a procedural challenge to the administration of an election, and we can resolve this constitutional claim without inquiring into the content of the proposal to be voted on. Accordingly, we put *Bates* to one side and turn to a different strand of Ninth Circuit precedent.

Several appellate courts, including our own, have held that an election is a denial of substantive due process if it is conducted in a manner that is fundamentally unfair. *E.g., Soules v. Kauaians for Nukolii Campaign Comm.,* 849 F.2d 1176, 1183-84 (9th Cir. 1988). We have drawn a distinction between "garden variety" election irregularities and a pervasive error that undermines the integrity of the vote. *Id.* In general, garden variety election

irregularities do not violate the Due Process Clause, even if they control the outcome of the vote or election. *Gold v. Feinberg*, 101 F.3d 796, 801 (2d Cir. 1996) (human error resulting in miscounting of votes, presence of ineligible candidates on ballot, and delay in arrival of voting machines); *Curry v. Baker*, 802 F.2d 1302, 1316 (11th Cir. 1986) (allegedly inadequate state response to illegal cross-over voting); *Bodine v. Elkhart County Elec. Bd.*, 788 F.2d 1270, 1272 (7th Cir. 1986) (mechanical and human error in counting votes); *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) (technical deficiencies in printing ballots); *Gamza v. Aguirre*, 619 F.2d 449, 454 (5th Cir. 1980) (negligent vote counting); *Hennings v. Grafton*, 523 F.2d 861, 864-65 (7th Cir. 1975) (malfunctioning of voting machines); *Pettengill v. Putnam County R-1 School Dist.*, 472 F.2d 121, 122 (8th Cir. 1973) (counting some votes that were illegally cast); *Powell v. Power* 436 F.2d 84 (2d Cir. 1970) (non-party members mistakenly allowed to vote in congressional primary); *Johnson v. Hood*, 430 F.2d 610, 613 (5th Cir. 1970) (arbitrary rejection of 10 ballots).

However, when election irregularities transcended garden variety problems, the election is invalid. In *Griffin v. Burns*, 570 F.2d 1065, the First Circuit dealt with Rhode Island's practice of counting absentee ballots in state primary elections. The established practice in the state was to count such ballots, and state election officials advertised to voters that absentee ballots would be counted in the primaries. *Id.* at 1067. However, after the vote, the Rhode Island Supreme Court invalidated the absentee ballots, finding them improper in primary elections. *Id.* at

1068. This ruling meant that 10 percent of the total votes cast would not count. *Id.* at 1067.

The First Circuit ruled the primary unconstitutional. The court focused on the massive *ex post* disenfranchisement that the Rhode Island Supreme Court's ruling created, and it noted that the ruling would have been a total surprise to the typical voter. *Id.* at 1078-79.

Roe v. Alabama, 43 F.3d 574, also dealt with surprise to the voters and disenfranchisement. In that case, the prior Alabama practice had been not to count absentee ballots unless they were notarized and witnessed; but after the 1994 election, an Alabama court ordered the improperly submitted absentee ballots to be counted. The Eleventh Circuit ruled the election fundamentally unfair, citing two theories: first, that Alabama was diluting the votes of those who had submitted proper ballots; and second, that Alabama had disenfranchised those people who would have voted absentee, but were deterred from doing so because they did not want to expend the effort to obtain notarization and witness validation of their ballots.

The limits of *Griffin* and *Roe* are demonstrated by *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825 (1st Cir. 1980). In *Barreto Perez*, the court upheld the Supreme Court of Puerto Rico's decision to count mismarked ballots, notwithstanding the surprise this created for the voters. The court rejected that vote "dilution" could be a constitutional violation, reasoning that counting *more* votes than had previously been permitted did not *dis*enfranchise anyone. *Id.* at 828. The court also noted that, on the facts of *Barreto Perez*, there was no reliance by anyone on the previously understood election practice because

no one could really have "relied" on the assumed invalidity of ballots in which the mark was drawn slightly outside of the printed rectangle. *Id.*

A general pattern emerges from all of these cases taken together. Mere fraud or mistake will not render an election invalid. However, a court will strike down an election on substantive due process grounds if two elements are present: (1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures.[3]

It is immediately apparent that neither element is present in this case. As in *Barreto Perez*, one requires a vivid imagination to see how voters could have "relied" on an understanding that blank ballots would not be counted. Citizens who wished to vote "yes" or "no" were presented with a clear way to do so. Voters who didn't care simply left the question blank. It is beyond belief to suggest that thousands of voters who left the convention question blank were secretly relying on the hope that their votes would not be counted, and that they would have voted "yes" had they foreseen the decision in

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[3] This is not an exhaustive description of electoral problems that might be fundamentally unfair. *See, e.g., Duncan v. Poythress*, 657 F.2d 691, 703 (5th Cir. Unit B) (entire electorate disenfranchised when legally required election did not occur); *Griffin*, 570 F.2d at 1080 ("outrageous racial discrimination" requires invalidating an election "simply for its lack of integrity").

Yoshina I. They did not vote because they did not care or did not care enough to do so.

Further, there was no disenfranchisement or meaningful vote dilution in this case. Every ballot submitted was counted, and no one was deterred from going to the polls. The massive disenfranchisement of absentee voters present in *Griffin* and the deterrence of people who would have voted in *Roe* are simply not present here.

In the end, the Hawaii Supreme Court's decision in *Yoshina I* was merely a clarification of the state's election laws: Hawaii used to interpret voter indifference as a reason neither for nor against amending the state constitution, but now interprets voter indifference as a reason not to convene a constitutional convention.[4] This *ex post* clarification of the state's election laws possibly amounts, at worst, to a garden variety election irregularity, but is hardly a pervasive error that undermines the integrity of the vote. *Soules*, 849 F.2d at 1183-84. Accordingly, we reject Bennett's substantive due process challenge.

B.

Bennett's second, separate constitutional challenge is based on the First Amendment. He argues that Hawaii's policy of putting all questions on the same physical

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[4] Bennett and Yoshina disagree on whether this issue has been outcome determinative in any past election on whether to convene a constitutional convention. The record does not solidly support either side.

ballot,[5] when combined with *Yoshina I*'s method for calculating a majority, "coerces" votes in violation of the First Amendment. Bennett correctly observes that the combination of these rules effectively prevents Hawaii voters from abstaining solely on the constitutional convention question: Provided the voter turns in a ballot, that ballot will have a legal effect on the constitutional convention question, regardless of whether the voter answered "yes," "no," or not at all. In Bennett's view this coerces the citizens to vote; and, because blank ballots have the same effect as "no" votes under the rule announced in *Yoshina I*, this is content-based speech discrimination.

The central problem with Bennett's First Amendment claim is his inability to distinguish between a state's forcing someone to vote and a state's deciding not to bother with a constitutional convention unless most of the citizens express an interest in one. It is perfectly constitutional for a state to demand that a proposition win not only a majority of the votes cast, but a majority of all the votes that could have been cast. *Gordon v. Lance*, 403 U.S. 1, 7 (1971); *Gray v. Town of Darien*, 927 F.2d 69, 70 (2d Cir. 1991); *Hall v. Thornton*, 445 F.2d 834, 835 (4th Cir. 1971). That is not very different from requiring that a proposition win a majority of all the votes that could have been cast by everyone who actually went to the polls – which is what Hawaii does. In short, Hawaii is not

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[5] It is unclear if Hawaii election officials are required to do this. Bennett states that Haw. Rev. Stat. § 11-137 mandates that all questions appear on the same physical ballot, but that statute merely prohibits the exhibition or removal of ballots from the polling place.

forcing anybody to vote. It is just deciding not to hold a constitutional convention if the majority of voters either don't want one or don't care.

Nor does Hawaii impermissibly convert blank ballots into "no" votes. *See Burdick*, 504 U.S. at 438 (upholding the reasonable regulation of speech on election ballots, but concluding that states may not "require voters to espouse positions they do not support"). Under Hawaii's procedure, blank votes are counted as blank and communicated to the world as blank, so the expressive content of the voter's blank ballot is not altered. What Bennett is really complaining about is that *Yoshina I*'s definition of a majority of "ballots cast" makes it difficult for "yes" votes to prevail. But that has nothing to do with speech.

We reject Bennett's free speech claim.

IV.

Having concluded that the Hawaii Supreme Court's decision in *Yoshina I* did not violate any voter's free speech or substantive due process rights, we reverse the district court's grant of summary judgment for Bennett in No. 97-16408, and remand with instructions to enter summary judgment in favor of Yoshina. We vacate the district court's injunction ordering a new election on the constitutional convention question and the stay of the injunction pending appeal.

Our disposition of the merits also resolves the remaining issues before us. In No. 97-16543, Bennett cross-appeals the district court's order for a new vote, seeking an order requiring Hawaii to certify that the

constitutional convention question passed. In Nos. 97-16540 and 97-16596, the AFL-CIO appeals the district court's denial of its motion to intervene. We dismiss these three appeals as moot. Yoshina shall recover his costs on appeal from Bennett. Bennett and the AFL-CIO shall bear their own costs on appeal.

REVERSED and REMANDED in part, VACATED in part, and DISMISSED in part.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARK J. BENNETT; CHARLES S. FRUMIN; BOBBY CARINIO; MARK R. SPENGLER; LET THE PEOPLE DECIDE; CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves and others similarly situated, and JERRY BECK, *Plaintiffs-Appellees,* v. DWAYNE D. YOSHINA, Chief, Elections Officer of the State of Hawaii; Office of Elections; MAZIE K. HIRONO, Lieutenant Governor of the State of Hawaii, and; BENJAMIN J. CAYETANO, Governor of the State of Hawaii, in their official capacities, *Defendants-Appellants.*	No. 97-16408 D.C. No. CV 97-0322 DAE

MARK J. BENNETT; CHARLES S. FRUMIN; BOBBY CARINIO; MARK R. SPENGLER; LET THE PEOPLE DECIDE; CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves and others similarly situated, and JERRY BECK, *Plaintiffs-Appellants,* v. DWAYNE D. YOSHINA, Chief, Elections Officer of the State of	No. 97-16543 D.C. No. CV 97-0322 DAE

Hawaii; Office of Elections; MAZIE K. HIRONO, Lieutenant Governor of the State of Hawaii, and; BENJAMIN J. CAYETANO, Governor of the State of Hawaii,

Defendants-Appellees.

and

HAWAII STATE AFL-CIO; GARY W. RODRIGUES; RUSSELL OKATA; KEITH AHUE; JACKIE FERGUSON-MIYAMOTO; DONALD ABDUL; NILDA CHOCK; CLAYTON DELA CRUZ; GUY FUJIMURA; CARMELA GOMEZ; LEONARD HOSHIJO; JONATHAN KANE; MARK MATSUMOTO; STUART MCKINLEY; RICHARD RUTT; LAWRENCE SAKAMOTO; HOWARD TASAKA; PETER TRASK; ADALINE UHRLE; GEORGE YASUMOTO; MICHAEL AMII; DENNIS CHANG; PATRICIA A. CHOW; GAREN R. DEWEESE; LESLIE ANNE DEWEESE; JAN DOI; ROBERT DOI; MELVIN FONG; KIMBERLY HAINES; WILLIAM HOSHIJO; MARSHA R. JOYNER; CALVIN KOSEKI; LEIMALAMA LEE LOI; ROBERT MATSUNAKA; LAVERNE MOORE; JANETTE M. NAGAO; ROBERT H. NAGAO; CRAIG NAHM; AYAKO NAKANISHI; DOUGLASS PANG; LARRY SAKODA; ETHEL SHINTAKU; ANDREI SOTO; GEORGE THOMAS; LEILANI THOMAS; LINDA N. THOMAS; JEANINE TSUCHIYA; MAUREEN WAKUZAWA; HARRY WOOD; LANA YOUNG,

Defendants-Intervenors-Appellees.

MARK J. BENNETT; CHARLES S. FRUMIN; BOBBY CARINIO; MARK R. SPENGLER; LET THE PEOPLE DECIDE; CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves and others similarly situated, and JERRY BECK,

Plaintiffs-Appellees,

v.

DWAYNE D. YOSHINA, Chief, Elections Officer of the State of Hawaii; Office of Elections; MAZIE K. HIRONO, Lieutenant Governor of the State of Hawaii, in their individual capacities; OFFICE OF ELECTIONS; BENJAMIN J. CAYETANO, Governor of the State of Hawaii,

Defendants,

and

HAWAII STATE AFL-CIO; GARY W. RODRIGUES; RUSSELL OKATA; KEITH AHUE; JACKIE FERGUSON-MIYAMOTO; DONALD ABDUL; NILDA CHOCK; CLAYTON DELA CRUZ; GUY FUJIMURA; CARMELA GOMEZ; LEONARD HOSHIJO; JONATHAN KANE; MARK MATSUMOTO; STUART MCKINLEY; RICHARD RUTT; LAWRENCE SAKAMOTO; HOWARD TASAKA; PETER TRASK; ADALINE UHRLE; GEORGE YASUMOTO; MICHAEL AMII; DENNIS CHANG; PATRICIA A. CHOW; GAREN R.

No. 97-16540

D.C. No. CV 97-0322 DAE

DEWEESE; LESLIE ANNE DEWEESE; JAN DOI; ROBERT DOI; MELVIN FONG; KIMBERLY HAINES; WILLIAM HOSHIJO; MARSHA R. JOYNER; CALVIN KOSEKI; LEIMALAMA LEE LOI; ROBERT MATSUNAKA; LAVERNE MOORE; JANETTE M. NAGAO; ROBERT H. NAGAO; CRAIG NAHM; AYAKO NAKANISHI; DOUGLASS PANG; LARRY SAKODA; ETHEL SHINTAKU; ANDREI SOTO; GEORGE THOMAS; LEILANI THOMAS; LINDA N. THOMAS; JEANINE TSUCHIYA; MAUREEN WAKUZAWA; HARRY WOOD; LANA YOUNG,

Defendants-Intervenors-Appellants.

MARK J. BENNETT; CHARLES S. FRUMIN; BOBBY CARINIO; MARK R. SPENGLER; LET THE PEOPLE DECIDE; CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves and others similarly situated, and JERRY BECK,

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v.

DWAYNE D. YOSHINA, Chief, Elections Officer of the State of Hawaii; Office of Elections; MAZIE K. HIRONO, Lieutenant Governor of the State of Hawaii,

and; BENJAMIN J. CAYETANO, Governor of the State of Hawaii in their official capacities; OFFICE OF ELECTIONS,

Defendants,

and

HAWAII STATE AFL-CIO; GARY W. RODRIGUES; RUSSELL OKATA; KEITH AHUE; JACKIE FERGUSON-MIYAMOTO; DONALD ABDUL; NILDA CHOCK; CLAYTON DELA CRUZ; GUY FUJIMURA; CARMELA GOMEZ; LEONARD HOSHIJO; JONATHAN KANE; MARK MATSUMOTO; STUART MCKINLEY; RICHARD RUTT; LAWRENCE SAKAMOTO; HOWARD TASAKA; PETER TRASK; ADALINE UHRLE; GEORGE YASUMOTO; MICHAEL AMII; DENNIS CHANG; PATRICIA A. CHOW; GAREN R. DEWEESE; LESLIE ANNE DEWEESE; JAN DOI; ROBERT DOI; MELVIN FONG; KIMBERLY HAINES; WILLIAM HOSHIJO; MARSHA R. JOYNER; CALVIN KOSEKI; LEIMALAMA LEE LOI; ROBERT MATSUNAKA; LAVERNE MOORE; JANETTE M. NAGAO; ROBERT H. NAGAO; CRAIG NAHM; AYAKO NAKANISHI; DOUGLASS PANG; LARRY SAKODA; ETHEL SHINTAKU; ANDREI SOTO; GEORGE THOMAS; LEILANI THOMAS; LINDA N. THOMAS; JEANINE TSUCHIYA; MAUREEN WAKUZAWA; HARRY WOOD; LANA YOUNG,

Defendants-Intervenors-Appellants.

No. 97-16596

D.C. No. CV 97-0322 DAE

Appeals from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding

Argued and Submitted
January 16, 1998 – San Francisco, California

Filed March 27, 1998

Before: Charles Wiggins, John T. Noonan, and
A. Wallace Tashima, Circuit Judges.

OPINION

TASHIMA, Circuit Judge:

This case presents a constitutional challenge to a vote put to the citizens of Hawaii on November 5, 1996. Plaintiffs ask us to invalidate the vote on the ground that the Hawaii Supreme Court's interpretation of blank ballots was so unforeseeable that the voters' substantive due process and free speech rights were violated. We reject this constitutional challenge and uphold the Hawaii vote.

I.

The vote at issue was on a question asking Hawaii voters whether they wished to hold a convention that would propose amendments to the Hawaii state constitution. The constitutional convention question was one of several unrelated items on the general ballot, including ratification votes on three proposed state constitutional amendments.

By way of background, amendments to the Hawaii constitution can be proposed either by the legislature or by a convention. Haw. Const. art. XVII, § 1. The Hawaii Constitution states:

> The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the constitution?" If any nine-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period.

Haw. Const. art. XVII, § 2. Amendments proposed by the convention must then be ratified by the people. *Id.* Pursuant to Haw. Const. art. XVII, § 2, voters were asked in 1966, 1976, 1986 and 1996 whether they wished to hold a constitutional convention.

Prior to 1996, machine-counted ballots that left the convention question blank were simply ignored in computing whether the convention question had passed. "Yes" votes were counted against "no" votes, and the majority ruled.

In preparation for the 1996 vote, the Office of Elections distributed an "information sheet" that was present at every polling place. The sheet explained the significance of a "yes" vote and a "no" vote, but was silent on what happened to blank ballots. Additionally, a few days before the election, the Office of Elections printed a "fact sheet" that said that a majority on the convention question would be determined without considering blank ballots. This fact sheet was available at the Office of Elections to be picked up, and some voters did so. The fact sheet was also available on the internet, although only a small number of "hits" occurred at this internet site.

At some point before the 1996 vote – it is unclear exactly when – the Office of Elections told Citizens for a Constitutional Convention ("Citizens") that blank ballots would not be counted on the convention question. Citizens is an organization that lobbied Hawaii voters in favor of the convention question, and it claims to have changed its campaign strategy in reliance on the Office of Elections' instruction.

At the November 5 election, the electorate voted (or failed to vote) on the constitutional convention question, as follows: 163,869 voters marked "yes"; 160,153 marked "no"; 45,245 left the question blank; and 90 marked both "yes" and "no." Thus, if blank ballots are counted, they control the outcome of the vote.

Shortly after the election, the Hawaii State AFL-CIO[1] sued Dwayne D. Yoshina, the Chief Elections Officer of Hawaii,[2] in an original action in the Hawaii Supreme Court. The AFL-CIO sought a declaratory judgment that the constitutional convention question had failed and an order directing Yoshina to certify that it had failed. The Hawaii Supreme Court ruled in favor of the AFL-CIO. *Hawai'i State AFL-CIO v. Yoshina*, 935 P.2d 89, 98 (Haw. 1997) (*"Yoshina I"*).

The court noted that Haw. Const. art. XVII, § 2, required a constitutional convention only if the question

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[1] The Hawaii State AFL-CIO was joined by 51 individually named plaintiffs in the state suit, but for convenience we refer only to the AFL-CIO.

[2] As in this case, several other defendants were also named. For convenience, we refer to them collectively as "Yoshina."

received a majority of the "*ballots cast* upon such a question." (Emphasis added.) Once a convention is convened, however, and amendments are proposed to the voters, the amendments pass if they receive "a majority of the *votes tallied* upon the question." Haw. Const. art. XVII, § 2 (emphasis added). The court noted the difference in language and pointed to a committee report from the 1950 constitutional convention that indicated that the difference in language had been intentional. *Yoshina I*, 935 P.2d at 95. Therefore, the court concluded that "ballots cast" included all submitted ballots that contained the question, while "votes tallied" meant only the "yes" or "no" votes (*i.e.*, blank ballots operated *against* the convention question). *Id.* at 96. Because in the 1996 convention vote, the "yes" votes did not constitute a majority of the total "ballots cast" (as the Hawaii Supreme Court understood that term), the court ordered Yoshina to certify that the question had failed. *Id.* at 98.

Three weeks after the Hawaii Supreme Court's ruling, Mark J. Bennett, Citizens for a Constitutional Convention, Let the People Decide, and several individual plaintiffs commenced this action. Some of the individuals alleged that they had abstained on the convention question, but that if they had known that not voting had the same effect as voting "no," they would have voted differently. The other individuals voted "yes," and the institutional plaintiffs alleged that their members mostly voted "yes" on the convention question. Plaintiffs (collectively, "Bennett") argued that the Hawaii Supreme Court's decision in *Yoshina I* was an unforeseeable departure from past election practices and was unconstitutional, primarily for lack of notice.

The Hawaii State AFL-CIO and 49 individually named plaintiffs (collectively "applicants" or "AFL-CIO") filed a motion to intervene in the case. The applicants – all parties to *Yoshina I* – claimed to have an ideological interest in the outcome of the case, as well as an interest in protecting their victory in state court. The motion to intervene was denied.

On cross-motions for summary judgment, the district court ruled for plaintiffs. It found that plaintiffs had standing, and granted their motion for class certification, rulings that are not contested on appeal. The court concluded that federal jurisdiction existed in this case, rejecting the *Rooker/Feldman* doctrine (*see District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923)) and the Eleventh Amendment as jurisdictional bars. Finally, the district court concluded that the constitutional convention vote had been fundamentally unfair because the Hawaii Supreme Court's opinion marked a departure from prior election practices, was unforeseeable to the average voter because it contradicted the previously understood election procedures, and contradicted information that the state itself had disseminated before the election. The court then ordered that a new election take place.

Everyone appeals. In No. 97-16408, Yoshina appeals the ruling that the Eleventh Amendment does not bar this suit, the conclusion that the convention vote was fundamentally unfair, and the order to conduct a new election. In No. 97-16543, Bennett cross-appeals the district court's decision to order a new election, instead of requiring

Hawaii to certify that the constitutional convention question passed. In Nos. 97-16540 and 97-16596, the AFL-CIO appeals the denial of its motion to intervene.

II.

Before we can reach the merits, we must overcome two jurisdictional hurdles. The first is the *Rooker/Feldman* doctrine, which holds that "a losing party in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States District Court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994). The rationale behind this doctrine is that the only federal court with the power to hear appeals from state courts is the United States Supreme Court. *Dubinka v. Judges of Sup. Ct.*, 23 F.3d 218, 221 (9th Cir. 1994).

We agree with the district court that the doctrine is not implicated in this case because it applies only when the federal plaintiff was a party to the state suit. *Johnson*, 512 U.S. at 1006. Here, the federal plaintiffs were not parties to the state suit. That case was between the AFL-CIO and Yoshina. Yoshina lost, and the referendum was decreed to have failed. Then a coalition of entirely new people sued Yoshina in federal court, and Yoshina is now in the position of having to defend his defeat in state court. However, since the new plaintiffs were not parties to the state suit, their suit is not barred by the *Rooker/Feldman* doctrine.

The only twist is that two of the federal plaintiffs, Citizens for a Constitutional Convention and Let the People Decide, participated in the state case as amici curiae. Amici, however, are not actually parties to a case, cannot conduct discovery, and do not have the right to appeal an adverse decision. Since the *Rooker/Feldman* doctrine applies only when the federal plaintiff was a party to the state case and is challenging an adverse decision by the state court, *Johnson*, 512 U.S. at 1005-06, it follows that mere participation in the state case as amici does not invoke the *Rooker/Feldman* bar. *Exxon Corp. v. Bd. of Ed. of Lamar County*, 849 F. Supp. 479, 487 (S.D. Miss. 1994), *aff'd*, 68 F.3d 472 (5th Cir. 1995) (per curiam). Accordingly, we conclude that the *Rooker/Feldman* doctrine does not apply.

We are likewise unpersuaded by Yoshina's argument that we lack jurisdiction because of the Eleventh Amendment. The Amendment is understood to bar suits by a person against a state on questions of federal law. *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1122 (1996). However, an exception exists for a suit that seeks prospective relief from a state's ongoing constitutional violation, provided it names a state official as the defendant. *Edelman v. Jordan*, 415 U.S. 651, 664-66 (1974); *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

Yoshina argues that no ongoing constitutional violation exists, reasoning that the November 5, 1996, election has already taken place and whatever problems may have occurred are unlikely to be repeated. In effect, Yoshina argues that completed state election mishaps can never be reviewed in federal court because once the election has occurred, any relief would be retrospective. The flaw in

this argument is Yoshina's unduly narrow conception of the alleged constitutional injury. If, after ruling that blank ballots counted against the convention question, the Hawaii Supreme Court had also decided that it was unfair to surprise voters with this new rule and ordered a new election, we do not suppose that Bennett would have troubled himself with a federal lawsuit. What Bennett objects to is not the mere occurrence of an allegedly unfair vote, but the state's decision *to give effect* to that vote. And obviously, the legal effectiveness of the 1996 vote – *i.e.*, whether a constitutional convention will take place – is something that will, or will not, happen in the future. Thus, we conclude that Bennett seeks prospective, not retrospective, relief. *Cf. Goodisman v. Lytle*, 724 F.2d 818, 820 (9th Cir. 1984) (holding that Eleventh Amendment does not bar a suit by a public employee seeking reinstatement, despite the fact that the unconstitutional termination was already completed).

Further, a decision by this court that the Eleventh Amendment bars this suit would be contrary to the decisions of several other circuits which, while not explicitly addressing the Eleventh Amendment, decided the constitutionality of completed election errors. *E.g., Roe v Alabama*, 43 F.3d 574 (11th Cir. 1995); *Curry v. Baker*, 802 F.2d 1302 (11th Cir. 1986); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978). While these cases did not directly confront the Eleventh Amendment question we decide today, we decline to suggest that those other courts acted in the absence of federal jurisdiction. Accordingly, we reject Yoshina's Eleventh Amendment argument.

Having surmounted the jurisdictional barriers, we now turn to the merits.

III.

Bennett makes two broad constitutional attacks on the 1996 convention vote. First, he argues that *Yoshina I* was a totally unforeseeable interpretation of the state's election laws and, therefore, amounted to a denial of substantive due process. Conceding that the Hawaii Supreme Court is the ultimate arbiter of Hawaii law and that the court had never before ruled on whether blank ballots counted in a constitutional convention vote, Bennett nonetheless argues that the past election practice was sufficiently clear that voters were unfairly surprised by *Yoshina I*. He also points to the misinformation distributed by the state as evidence of the voters' surprise.

Second, Bennett argues that counting blank ballots as votes against the constitutional convention question violates the First Amendment. He contends that the Hawaii Supreme Court effectively re-wrote voters' abstentions into "no" votes and that this rewriting amounted to unconstitutionally coerced speech.

We first postulate two assumptions that must guide the constitutional inquiry before us. First, states have considerable freedom to design their own election laws. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The Supreme Court has long held that the structure of a state's internal democratic processes is a "political question" beyond the ken of judicial review. *Baker v. Carr*, 369 U.S. 186, 218-226 (1961) (citing cases). Although federal courts may invalidate state election laws that deny some voters equal protection of the law, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), unduly burden free speech, *Anderson v. Celebrezze*, 460 U.S. 780, 788-90 (1983), or violate a federal statute,

Foster v. Love, 118 S. Ct. 464, 467 (1997), we must normally defer to the states' regulatory interests when these federal rights are not implicated. *Cf. Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364, 1369 (1997) (recognizing states' regulatory interests).

Second, the Hawaii Supreme Court is by definition the final arbiter of Hawaii law. *Johnson v. Fankell*, 117 S. Ct. 1800, 1804 (1997). We are powerless to review that court's decision in *Yoshina I*, even if we thought it was wrong or contrary to general principles of election laws. Insofar as Bennett's suit is a backhanded critique of the merits of *Yoshina I*, we should be clear that we are unwilling and unable to indulge this.

With these general principles in mind, we now turn to Bennett's constitutional claims.

A.

Bennett's first claim is that Hawaii's unforeseeable departure from past election practices was a denial of substantive due process.

In *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997) (en banc), we recently considered what restraints substantive due process places on a state's election laws. In *Bates*, we upheld a California term limits initiative against the claim that voters did not understand that the initiative imposed a lifetime limit on officeholders. *Id.* at 846. We assumed, "without deciding, that a federal court may determine whether a state has given adequate notice to its voters in connection with a statewide initiative ballot

measure. . . . " *Id.* We then concluded that adequate notice existed, assuming any was needed. *Id.*

We agree with Bennett that *Bates* does not resolve the substantive due process claim in this case. First, *Bates* did not actually decide whether voters must receive notice of what they are voting on – it merely assumed so *arguendo.* Second, the notice at issue in *Bates* is of a completely different kind from the notice at issue in this case. In *Bates,* the court dealt with whether voters understood the substantive content of what they were voting on. The lack-of-notice argument was a radical challenge to the entire initiative process, and indeed the entire legislative process, because it effectively claimed that federal courts could strike down legislation whenever the legislators did not understand what they were doing. We deal here with a more modest substantive due process claim. Bennett challenges only Hawaii's election procedures, and he argues only that voters need to understand *that they are voting,* not the substance of what they are voting on, or anything else. Thus, unlike *Bates,* this case concerns a procedural challenge to the administration of an election, and we can resolve this constitutional claim without inquiring into the content of the proposal to be voted on. Accordingly, we put *Bates* to one side and turn to a different strand of Ninth Circuit precedent.

Several appellate courts, including our own, have held that an election is a denial of substantive due process if it is conducted in a manner that is fundamentally unfair. *E.g., Soules v. Kauaians for Nukolii Campaign Comm.,* 849 F.2d 1176, 1183-84 (9th Cir. 1988). We have drawn a

distinction between "garden variety" election irregularities and a pervasive error that undermines the integrity of the vote. *Id.* In general, garden variety election irregularities do not violate the Due Process Clause, even if they control the outcome of the vote or election. *Gold v. Feinberg,* 101 F.3d 796, 801 (2d Cir. 1996) (human error resulting in miscounting of votes, presence of ineligible candidates on ballot, and delay in arrival of voting machines); *Curry v. Baker,* 802 F.2d 1302, 1316 (11th Cir. 1986) (allegedly inadequate state response to illegal cross-over voting); *Bodine v. Elkhart County Elec. Bd.,* 788 F.2d 1270, 1272 (7th Cir. 1986) (mechanical and human error in counting votes); *Hendon v. North Carolina State Bd. of Elections,* 710 F.2d 177, 182 (4th Cir. 1983) (technical deficiencies in printing ballots); *Gamza v. Aguirre,* 619 F.2d 449, 454 (5th Cir. 1980) (negligent vote counting); *Hennings v. Grafton,* 523 F.2d 861, 864-65 (7th Cir. 1975) (malfunctioning of voting machines); *Pettengill v. Putnam County R-1 School Dist.,* 472 F.2d 121, 122 (8th Cir. 1973) (counting some votes that were illegally cast); *Powell v. Power* 436 F.2d 84 (2d Cir. 1970) (non-party members mistakenly allowed to vote in congressional primary); *Johnson v. Hood,* 430 F.2d 610, 613 (5th Cir. 1970) (arbitrary rejection of 10 ballots).

However, when election irregularities transcended garden variety problems, the election is invalid. In *Griffin v. Burns,* 570 F.2d 1065, the First Circuit dealt with Rhode Island's practice of counting absentee ballots in state primary elections. The established practice in the state was to count such ballots, and state election officials advertised to voters that absentee ballots would be counted in the primaries. *Id.* at 1067. However, after the vote,

the Rhode Island Supreme Court invalidated the absentee ballots, finding them improper in primary elections. *Id.* at 1068. This ruling meant that 10 percent of the total votes cast would not count. *Id.* at 1067.

The First Circuit ruled the primary unconstitutional. The court focused on the massive *ex post* disenfranchisement that the Rhode Island Supreme Court's ruling created, and it noted that the ruling would have been a total surprise to the typical voter. *Id.* at 1078-79.

Roe v. Alabama, 43 F.3d 574, also dealt with surprise to the voters and disenfranchisement. In that case, the prior Alabama practice had been not to count absentee ballots unless they were notarized and witnessed; but after the 1994 election, an Alabama court ordered the improperly submitted absentee ballots to be counted. The Eleventh Circuit ruled the election fundamentally unfair, citing two theories: first, that Alabama was diluting the votes of those who had submitted proper ballots; and second, that Alabama had disenfranchised those people who would have voted absentee, but were deterred from doing so because they did not want to expend the effort to obtain notarization and witness validation of their ballots.

The limits of *Griffin* and *Roe* are demonstrated by *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825 (1st Cir. 1980). In *Barreto Perez*, the court upheld the Supreme Court of Puerto Rico's decision to count mismarked ballots, notwithstanding the surprise this created for the voters. The court rejected that vote "dilution" could be a constitutional violation, reasoning that counting *more* votes than had previously been permitted did not *disen*franchise anyone. *Id.* at 828. The court also noted that, on

the facts of *Barreto Perez*, there was no reliance by anyone on the previously understood election practice because no one could really have "relied" on the assumed invalidity of ballots in which the mark was drawn slightly outside of the printed rectangle. *Id.*

A general pattern emerges from all of these cases taken together. Mere fraud or mistake will not render an election invalid. However, a court will strike down an election on substantive due process grounds if two elements are present: (1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures.[3]

It is immediately apparent that neither element is present in this case. As in *Barreto Perez*, one requires a vivid imagination to see how voters could have "relied" on an understanding that blank ballots would not be counted. Citizens who wished to vote "yes" or "no" were presented with a clear way to do so. Voters who didn't care simply left the question blank. It is beyond belief to suggest that thousands of voters who left the convention question blank were secretly relying on the hope that their votes would not be counted, and that they would

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[3] This is not an exhaustive description of electoral problems that might be fundamentally unfair. *See, e.g., Duncan v. Poythress*, 657 F.2d 691, 703 (5th Cir. Unit B) (entire electorate disenfranchised when legally required election did not occur); *Griffin*, 570 F.2d at 1080 ("outrageous racial discrimination" requires invalidating an election "simply for its lack of integrity").

have voted "yes" had they foreseen the decision in *Yoshina I*. They did not vote because they did not care or did not care enough to do so.

Further, there was no disenfranchisement or meaningful vote dilution in this case. Every ballot submitted was counted, and no one was deterred from going to the polls. The massive disenfranchisement of absentee voters present in *Griffin* and the deterrence of people who would have voted in *Roe* are simply not present here.

In the end, the Hawaii Supreme Court's decision in *Yoshina I* was merely a clarification of the state's election laws: Hawaii used to interpret voter indifference as a reason neither for nor against amending the state constitution, but now interprets voter indifference as a reason not to convene a constitutional convention.[4] This *ex post* clarification of the state's election laws possibly amounts, at worst, to a garden variety election irregularity, but is hardly a pervasive error that undermines the integrity of the vote. *Soules*, 849 F.2d at 1183-84. Accordingly, we reject Bennett's substantive due process challenge.

B.

Bennett's second, separate constitutional challenge is based on the First Amendment. He argues that Hawaii's

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[4] Bennett and Yoshina disagree on whether this issue has been outcome determinative in any past election on whether to convene a constitutional convention. The record does not solidly support either side.

policy of putting all questions on the same physical ballot,[5] when combined with *Yoshina I*'s method for calculating a majority, "coerces" votes in violation of the First Amendment. Bennett correctly observes that the combination of these rules effectively prevents Hawaii voters from abstaining solely on the constitutional convention question: Provided the voter turns in a ballot, that ballot will have a legal effect on the constitutional convention question, regardless of whether the voter answered "yes," "no," or not at all. In Bennett's view this coerces the citizens to vote; and, because blank ballots have the same effect as "no" votes under the rule announced in *Yoshina I*, this is content-based speech discrimination.

The central problem with Bennett's First Amendment claim is his inability to distinguish between a state's forcing someone to vote and a state's deciding not to bother with a constitutional convention unless most of the citizens express an interest in one. It is perfectly constitutional for a state to demand that a proposition win not only a majority of the votes cast, but a majority of all the votes that could have been cast. *Gordon v. Lance*, 403 U.S. 1, 7 (1971); *Gray v. Town of Darien*, 927 F.2d 69, 70 (2d Cir. 1991); *Hall v. Thornton*, 445 F.2d 834, 835 (4th Cir. 1971). That is not very different from requiring that a proposition win a majority of all the votes that could have been cast by everyone who actually went to the

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[5] It is unclear if Hawaii election officials are required to do this. Bennett states that Haw. Rev. Stat. § 11-137 mandates that all questions appear on the same physical ballot, but that statute merely prohibits the exhibition or removal of ballots from the polling place.

polls – which is what Hawaii does. In short, Hawaii is not forcing anybody to vote. It is just deciding not to hold a constitutional convention if the majority of voters either don't want one or don't care.

Nor does Hawaii impermissibly convert blank ballots into "no" votes. *See Burdick*, 504 U.S. at 438 (upholding the reasonable regulation of speech on election ballots, but concluding that states may not "require voters to espouse positions they do not support"). Under Hawaii's procedure, blank votes are counted as blank and communicated to the world as blank, so the expressive content of the voter's blank ballot is not altered. What Bennett is really complaining about is that *Yoshina I*'s definition of a majority of "ballots cast" makes it difficult for "yes" votes to prevail. But that has nothing to do with speech.

We reject Bennett's free speech claim.

IV.

Having concluded that the Hawaii Supreme Court's decision in *Yoshina I* did not violate any voter's free speech or substantive due process rights, we reverse the district court's grant of summary judgment for Bennett in No. 97-16408, and remand with instructions to enter summary judgment in favor of Yoshina. We vacate the district court's injunction ordering a new election on the constitutional convention question and the stay of the injunction pending appeal.

Our disposition of the merits also resolves the remaining issues before us. In No. 97-16543, Bennett cross-appeals the district court's order for a new vote,

seeking an order requiring Hawaii to certify that the constitutional convention question passed. In Nos. 97-16540 and 97-16596, the AFL-CIO appeals the district court's denial of its motion to intervene. We dismiss these three appeals as moot. Yoshina shall recover his costs on appeal from Bennett. Bennett and the AFL-CIO shall bear their own costs on appeal.

REVERSED and REMANDED in part, VACATED in part, and DISMISSED in part.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARK J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, JERRY BECK, LET THE PEOPLE DECIDE, AND CITIZENS FOR A CONSTITUTIONAL CONVENTION, ON BEHALF OF THEMSELVES, AND OTHERS SIMILARLY SITUATED,	CV. NO. 97-00322 DAE
Plaintiffs,	
vs.	
DWAYNE D. YOSHINA, CHIEF ELECTION OFFICER OF THE STATE OF HAWAII; OFFICE OF ELECTIONS, STATE OF HAWAII; MAZIE K. HIRONO, LIEUTENANT GOVERNOR OF THE STATE OF HAWAII; IN THEIR OFFICIAL CAPACITIES,	
Defendants.	

(Filed July 10, 1997)

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND ORDERING SPECIAL ELECTION

The court heard the parties' Motions on July 7, 1997 Mark J. Bennett, Esq., appeared at the hearing on behalf of Plaintiffs; Deputy Attorney General John P. Dellera, appeared at the hearing on behalf of Defendants. After reviewing the motions and the supporting and opposing memoranda, the court GRANTS Plaintiffs' Motion for Class Certification, GRANTS Plaintiffs' Motion for Summary Judgment, DENIES Defendants' Cross-Motion for Summary Judgment, and ORDERS a Special Election on the issue of a Constitutional Convention for the State of Hawaii.

BACKGROUND

This case revolves around a requirement contained within the Hawaii Constitution mandating that every ten years the question of whether a constitutional convention shall be held must be placed before the voters.

The 1996 Hawaii general election ballot contained a question as to whether there shall "be a convention to propose a revision of or amendments to the Constitution." Hawaii's Constitution provides that "if a majority of the ballots cast upon such a question be in the affirmative," delegates to the convention shall be chosen and

elected.[1] Historically, and without exception, the past practice in Hawaii had been not to count blank ballots as ballots cast upon the constitutional convention ("con-con") question.

The Elections Office distributed to the voters, both in written form, and on the Internet, information that specifically told voters, that in calculating a majority on the con-con question, if the "yes" votes exceeded the "no" votes, the con-con question would pass, and that blank ballots would not be counted for any purpose.

One of the named Plaintiffs, Citizens for a Constitutional Convention ("Citizens"), had been informing voters that blank ballots would count as "no" votes. Citizens was contacted by the Elections Office shortly before the election, told that blank ballots would not count, and told that they were absolutely prohibited from telling voters that blank ballots would count. Citizens is an organization of several hundred people who were actively campaigning for the con-con, and changed its course as a result of what it was told.

The con-con question was approved. The elections officials found that the "yes" votes exceeded the "no" votes. The blank ballots were not counted. Following the election, the Hawaii Attorney General issued a formal opinion that according to the Hawaii Constitution, the blank ballots did not count, and that the con-con was approved. A local labor union – the UPW – filed an election challenge, and the Hawaii Supreme Court ruled for the first time that blank ballots should have been

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[1] Haw. Const. Art. XVIII § 2.

counted, and that the con-con question did not pass. The Court made a distinction between those voters who did not turn in their ballots at all and those who turned in ballots which were blank on the con-con question. Those ballots which were not turned in were not counted; those which were turned in blank were counted as "no" votes.

In Hawaii, a constitutional convention is the only way citizens have to directly amend their State Constitution. There is no right to an initiative. The right to vote on a constitutional convention only comes to citizens of Hawaii once every ten years.

Plaintiffs claim that they have First and Fourteenth Amendment rights to a fundamentally fair election. They claim that it is fundamentally unfair if voters are given no notice of what their votes will mean. Consequently, Plaintiffs argue, it is *a priori* fundamentally unfair if voters are actually given the wrong information by the State as to what their votes will mean.

DISCUSSION

I. Class Certification

The decision to grant or deny class certification rests within the sound discretion of the trial court. *Yamamoto v. Omiya*, 564 F.2d 1319, 1325 (9th Cir. 1977). In order for a class action to be certified, plaintiffs must establish all of the requirements of Federal Rule of Civil Procedure 23(a) and at least one of the alternative requirements of Rule 23(b). *Blake v. Arnett*, 633 F.2d 906, 912 (9th Cir. 1981), Rule 23(a) provides as follows:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These tour requirements have been more conveniently termed: (1) "numerosity"; (2) "commonality"; (3) "typicality"; and (4) "adequacy." *See Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083, 103 S. Ct. 1772, 76 L. Ed. 2d 345 (1983); *Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705, 712 (D. Ariz. 1993). A district court's denial of class certification will not be overturned absent an abuse of the district court's discretion. *Siles v. ILGWU National Retirement Fund*, 783 F.2d 923, 926 (9th Cir. 1986).

The court will first note that Defendants apparently concede the fact that the first two requirements of numerosity and commonality have been met in this case. *See* Defendants' Memo in Opp. at 3. The court likewise finds little room for debate over the first two requirements.

A. Numerosity

In order to satisfy the numerosity element, as with all of the Rule 23 requirements, the person seeking class certification bears the burden of proving impracticability. *Siles*, 783 F.2d at 930 (class certification denied because

plaintiff failed to provide sufficient evidence of numerosity).[2] "Joinder is considered more practicable when all members of the same class are from the same geographic area. Where class members may be easily identified, joinder is also more practicable." *Hum v. Dericks*, 162 F.R.D. 628, 634 (D. Haw. 1995) Although the court is entitled to draw reasonable inferences of the class size from facts before it, *Sherman v. Grienpentrog*, 775 F. Supp. 1383, 1389 (D. Nev. 1991), a party seeking certification may not rely on conclusory allegations that joinder would be impracticable, or on mere speculation regarding the size of the class. *Siles*, 783 F.2d at 930.

There are 163,869 citizens who voted "yes" on the con-con question and 45,245 citizens who did not mark their ballots, and who turned those ballots over to precinct officials for deposit in the ballot box. Plaintiffs propose to certify a class of well over 100,000 individuals. Specifically, Plaintiffs seek certification of a class of "[t]hose citizens of the State of Hawaii who voted in the 1996 General Election, and who, on the question on the ballot as to whether there shall be a convention to propose a revision of or amendments to the Constitution, either voted in the affirmative, or did not mark their ballots either "yes" or "no," and who turned those ballots

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[2] In *Siles*, plaintiffs' only evidence of numerosity was that 31,000 employees covered by the plan, lost their jobs in 1974 and 1975. However, the plaintiffs presented no evidence regarding how many employees worked 10 years in covered employment, how many did not receive a pension, or how many did not work a year in covered employment after 1976. According to *Siles*, sheer numbers, without more, is insufficient to satisfy numerosity.

over to precinct officials for deposit in the ballot box." Clearly joinder of all members of this proposed class would not only be impracticable, but virtually impossible. The court deems this requirement met.

B. Common Questions of Law and Fact

Rule 23 provides for certification of a class action only if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2) Therefore, "to justify class action treatment, there must be some issue involved 'common to the class as a whole,' and relief must 'turn on questions of law applicable in the same manner to each member of the class.' " *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 648 (C.D. Cal. 1996) (citing *Ceneral Tel, Co. v. Falcon*, 457 U.S. 147, 155 (1982)).

Plaintiffs claim that common questions of law and fact exist between the Plaintiffs in the proposed class because they concern actions that were applicable to the class as a whole. The class members either voted affirmatively for the con-con or they did not vote one way or the other. Because the proposed class members allege that the post-election interpretation of the election standards violates their constitutional right to a fair election, they sufficiently allege common questions of law and fact. In addition, they all seek the same declaratory and injunctive relief: either certification that the con-con passed – or a new election. As Defendants raise no arguments to contest this, the court finds that the commonality requirement is met.

C. Typicality of Claims

Rule 23 requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality is met if other members of the class have similar injury resulting from the same course of conduct and as a class advanced similar legal theories. *Hanon v. Dataprods., Inc.*, 976 F.2d 497, 508 (9th Cir. 1992).

Defendants argue that typicality cannot be met where plaintiffs are subject to defenses that other plaintiffs are not subject to. Specifically, Defendants maintain that some plaintiffs may be subject to a defense of standing that is based upon lack of competent proof as to how they voted, while that standing defense may not apply to other class members who could show, through competent and admissible evidence, that they either supported or abstained from voting on the con-con question. Thus, according to Defendants, the position of the named representatives, and presumably other plaintiffs, is not typical of all members of the class. The court finds this argument to be without merit.[3]

While it is true that typicality may be lacking where the purported class representative is subject to a unique defense that could not be asserted against other members of the class, *Koos v. First National Bank of Peoria*, 496 F.2d 1162, 1165 (7th Cir. 1974), such is not the case here.

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[3] *See Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (upon the state's invalidation of absentee and shut-in votes, district court properly certified class comprised of all who voted by absentee or shut-in ballots in the primary, without regard to how each voted).

Voters, by their mere status as voters, have standing to sue for violation of their voting rights. *Gray v. Sanders*, 372 U.S. 368, 374 (1963) ("[A]ny person whose right to vote is impaired has standing to sue."). Although a voter cannot be allowed to impeach a certified election by stating the content of his vote, *National Federation of Railway Workers v. National Mediation Board*, 110 F.2d 529, 536 (D.C. Cir.), *cert. denied*, 310 U.S. 628 (1940), nothing prohibits an individual from stating how he voted in order to establish standing. Even if the defense of standing were not applicable to all class members, minor differences in defenses may be overlooked if they are not likely to affect fair representation of the class. *Hochschuler v. G.D. Searle & Co.*, 82 F.R.D. 339, 345 (N.D. Ill. 1978).

Defendants refer to differences in the factual allegations of the representatives in support of their argument that typicality is not met. Specifically, Defendants argue that because two representatives voted "yes", they have no claim for infringement of a "right to abstain" or for unequal treatment, and likewise, those representatives who turned in blank ballots have no claim for unlawful dilution of their vote. Thus, Defendants contend that the named representatives cannot represent the interests of all-class members, because their claims do not rest upon the same legal theories. *See* Defendants' Memo in Opp. at 4-5.

Defendants' argument fails for the following reasons. As noted in Defendants' memorandum, if a court finds that the representative's claims are not typical of the class, it may divide the class into subclasses and appoint a different representative for each, rather than dismissing the class action. *Evans v. Chicago*, 689 F.2d 1286 (7th Cir.

1982); FRCP 23(c)(4). Plaintiffs have already assigned named representatives to represent each subclass within the class: (1) Citizens campaigned for passage of the con-con; (2) two of the class representatives voted for can-con; and (3) three of the class representatives specifically did not vote on the con-con but turned in ballots.[4]

In the Ninth Circuit, a named plaintiff's claim will be typical of the class "where there is a nexus between the injury suffered by the plaintiff and the injury suffered by the class." *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1321 (9th Cir.) *vacated*, 459 U.S. 810 (1982). Therefore, "a named plaintiff's claim is typical if it stems from the same event, practice, or course of conduct that forms the basis of the class claims and is based upon the same legal or remedial theory." *Id.*

The entire class seeks relief from the same course of conduct based upon the same remedial theory. As the named representatives' claims are identical to that asserted for their respective subclasses, the court finds the typicality requirement to be satisfied.

Notwithstanding this, if only one representative is adequate, that satisfies the requirements of Rule 23. *Grasty v, Amalgamated Clothing & Textile Workers Union*, 828 F.2d 123, 128 (3rd Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988). Therefore, even if the court declined to subdivide the class, either Frumin or Bennett would be an adequate

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[4] Dividing the class into subclasses would solve any potential problems of overlapping issues. The class sought to be certified has several subparts: those who voted "yes," and those who voted, but did not vote on the con-con question and turned in their ballots, and those who campaigned for the con-con.

representative so that the typicality requirement would be satisfied in this case.

D. Adequacy of Representation

Class action is proper if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In order to show that representation is adequate, plaintiffs must demonstrate:

> (a) The class representative must not have interests antagonistic to the class regarding the substance of the litigation;
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> (b) The representative's attorney must be qualified, experienced and generally able to conduct the proposed litigation; and
>
> (c) The representative and his/her counsel will vigorously prosecute the action in a manner consistent with the best interests of the absent class members.

Honolulu Fed. Sav. & Loan Ass'n v. Verex Assurance, Inc., 116 F.R.D. 474, 476 (D. Haw. 1987) (citations omitted). In general, the representation is adequate if: (1) the attorney representing the class is qualified and competent; and (2) the class representatives are not disqualified by interests antagonistic to the remainder of the class. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). The differences between class members must be substantial and relate to potentially antagonistic objectives or perspectives to defeat adequacy of representation. *Gill v. Monroe Co.*, 95 F.R.D. 518, 520-21 (W.D. N.Y. 1982)

Counsel for Plaintiffs, is adequate to represent the class. Plaintiff's counsel has practiced before this court in extensive and complicated cases, including those which have raised major constitutional issues. This court is not aware of any reason why counsel for Plaintiffs would be inadequate or incompetent to handle the present case. Further, Defendants do not contest the competency of Plaintiff's counsel.

Defendants do claim, however, that because Plaintiffs' counsel is a named representative as well as counsel for the class, there is a potential conflict of interest. Again Defendants' argument fails, as the rationale for denying representative status to class members serving as counsel is only pertinent when monetary damages are sought, and when attorneys fees provide an incentive to reach an unfavorable settlement. *In re Hotel Tel. Charges*, 500 F.2d 86, 91 (9th Cir. 1974). None of the above rationale are applicable here.

E. Rule 23(b)(2)

Defendants also oppose class certification on the ground that such certification is unnecessary because any relief accorded to Plaintiffs will benefit the entire proposed class. This "lack of need" approach has been both embraced and rejected by a number of courts;[5] under this

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[5] Newberg, the leading commentator on class actions, came to this conclusion regarding this issue:

> Like Newton's Law of Thermodynamics, for every class denial on the basis of lack of need, one is able to find a decision, or several decisions, often in the same

rationale, district courts may deny class certification under Rule 23(b)(2) if certification is not needed for the potential class members to obtain the desired class-wide relief. *See Aacen v. San Juan County Sheriff's Dep't*, 944 F.2d 691, 700 (10th Cir. 1991); *Berger v. Heckler*, 771 F.2d 1556, 1566 (2nd Cir. 1985)

The Ninth Circuit, however, has not taken a clear position an this question. In *James v. Ball*, 613 F.2d 180 (9th Cir. 1979), *rev'd on other grounds*, 451 U.S. 355 (1981), the Ninth Circuit concluded that denial of certification was appropriate and not an abuse of discretion where "the relief sought will, as a practical matter, produce the same result as formal class-wide relief." *Id.* at 186. However, two district courts have interpreted a later Ninth Circuit case, *Zepeda v. INS*, 753 F.2d 719, 729-30 n.1 (9th Cir. 1972), as narrowing this holding to the situation where class-wide relief would inevitably follow if the requested individual relief were granted. *See Calderon v. Madigan*, 831 F. Supp. 1484, 1489 (D. Idaho 1992); *Nehmer v. United States Veterans' Administration*, 118 F.R.D. 113, 118 (N.D. Cal. 1987).

In *Nehmer*, the district court noted that the Ninth Circuit in *James* gave only a brief discussion to the issue

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> circuit, where other courts have certified Rule 23(b)(2) classes under virtually the same circumstances . . . [A] need requirement finds no support in Rule 23 and, if applied, would entirely negate any proper class certifications under Rule 23 (b), a result hardly intended by the Rules Advisory Committee.

1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 4.19, at 4-62, 4-70 (3rd ed. 1992).

and thus could not be considered as having adopted this requirement. *Nehmer*, 118 F.R.D. at 118. After reasoning that the precedential value of *James* was limited by its reversal and by *Zepeda*, the court then noted the "strong policy reasons against rigidly employing a need requirement":

> Litigating complex claims by class actions is a favored procedure, not only because class actions efficiently resolve the disputes of numerous similarly situated individuals, but because they have other advantages. For example, the use of class actions allows a large number of plaintiffs to pool resources to hire attorneys capable of conducting complex litigation. Class actions require court approval of settlements, so that courts can ensure that the interests of a wide group of people have been protected and advanced. Class actions enable unidentified class members to enforce court orders with contempt proceedings, rather than relying on the res judicata in a subsequent lawsuit. Finally, class actions enable plaintiffs to avoid the mooting to important claims.

Id. at 119. Given these advantages, and the fact that the need requirement does not appear in the text of Rule 23, the district court "question[ed] whether it should impose the need requirement on the plaintiffs in this case in the absence of clearer guidance by the Ninth Circuit." *Id.* Regardless, however, the district court concluded that the named plaintiffs demonstrated that class certification was necessary because part of the requested relief was to void prior benefits denials and it was uncertain at what point

defendant would recalculate benefits for non-class members, the date of the initial denied application or the date of the court's decision. *Id.*

While it is apparent that Plaintiffs are individually requesting relief identical to that sought by the proposed class, Plaintiffs maintain that class certification is necessary because of the expense of mounting a federal challenge to Defendants' electoral decision. This court agrees that class action is an appropriate mechanism for the instant case as courts have traditionally viewed electoral cases seeking declaratory or injunctive relief under 42 U.S.C. § 1983 as well-suited for class action treatment. *See Baker v. Carr*, 369 U.S. 186 (1962) (class action suit by voters of various counties regarding the constitutionality of state apportionment law was properly maintained under § 1983).

Therefore, because this court has found that certification is appropriate based upon the requirements of Rule 23, the nature of the allegations, and the relief sought, the court need not resolve whether the Ninth Circuit would require an additional element for class certification that is neither contained within the express language of Rule 23 nor previously expressly adopted by the Ninth Circuit.[6]

Rule 23(b)(2) states that a class may be certified if the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making

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[6] The court also notes at this point that the courts of appeals which have adopted the "lack of need" approach have done so when affirming the denials of class certification, as opposed to overruling a district court's decision to certify a class.

appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

The thrust of Plaintiffs' action is that the court issue declaratory and injunctive relief either enjoining Defendants from counting the blank ballots as "no" votes, thus requiring Defendants to certify that the con-con passed, or by ordering a new election. Consequently, for the above stated reasons and because the requirements of Rule 23 are satisfied, the court GRANTS Plaintiffs' Motion for Class Certification.

II. Plaintiffs' Motion for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986)). The movant must be able to show "the absence of a material and triable issue of fact," *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987), although it need not necessarily advance affidavits or

similar materials to negate the existence of an issue on which the nonmoving party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 323. *But cf., id.*, at 328 (White, J., concurring).

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support his legal theory. *Commodity futures Trading Comm'n v. Savage*, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party cannot stand on his pleadings, nor can he simply assert that he will be able to discredit the movant's evidence at trial. *See T.W. Elec.*, 809 F.2d at 630. Similarly, legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Moreover, "if the factual context makes the nonmoving party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987), (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)) (original emphasis).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. *See Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1289 (9th Cir. 1987) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Eisenberg*, 815 F.2d at 1289.

However, when "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *T.W. Elec.*, 809 F.2d at 631. Also, inferences from the facts must be drawn in the light most favorable to the nonmoving party. *Id.* These inferences may be drawn both from underlying facts that are not in dispute, as well as from disputed facts which the judge is required to resolve in favor of the nonmoving party. *Id.*

Plaintiffs claims can be summarized into one primary argument: that the Hawaii Supreme Court's interpretation of the election results was unforeseeable, and hence fundamentally unfair, According to Plaintiffs, this fundamental unfairness is of constitutional magnitude and mandates either: (1) an order by this court directing Defendants to issue a certificate certifying that the con-con question on the 1996 general election ballot was approved by the voters of the State of Hawaii; or (2) an order for a new special election on the con-con question within sixty days pursuant to § 11-174.5 of the Hawaii Revised Statutes.

A. Rooker-Feldman Doctrine

The Rooker-Feldman doctrine embodies the principles set forth by the Supreme Court in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923): "lower federal courts lack subject matter jurisdiction to engage in appellate review of state court determinations

> or to evaluate constitutional claims that are inextricably intertwined with the state court's [decision] in a judicial proceeding."

Marks v. Stinson, 19 F.3d 873, 885 n.11 (3rd Cir. 1994) *cert. denied*, 513 U.S. 1111 (1995). However, the *Rooker-Feldman* doctrine does not apply where the plaintiffs are not parties to the state court action. *Id.* in the instant case, the named Plaintiffs were not parties to the original state court action, and therefore, they had no opportunity to raise their constitutional claims in the state circuit court. Furthermore, rather than seeking review of the merits of the State's decision, Plaintiffs seek a determination of whether the decision violated their constitutional rights. Therefore, the *Rooker-Feldman* doctrine does not preclude judicial review in the instant case.[7]

B. Fundamentally Unfair Election

Plaintiffs argue that there is a constitutional right to vote in a fundamentally fair election. Defendants concede that Plaintiffs must prevail if the election was fundamentally unfair. Defendants' Memo. In Opp. at 14-19. Plaintiffs assert that based upon the reasoning of *Roe v. State of Alabama*, 43 F.3d 574 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 276 (1995), an election is fundamentally unfair if the State's interpretation of the ultimate result of an election was unforeseeable to the average voter. Defendants argue that *Roe*, is not analogous to the instant case.

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[7] Defendants do not dispute that the *Rooker-Feldman* doctrine is inapplicable in this case.

The *Roe* case involved Alabama's procedures for counting absentee ballots in elections. According to the Alabama Code, a person voting by absentee ballot was required to execute an "affidavit" in the presence of a "notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older." *Id.* at 577. Once the proper procedures were followed, the ballots were to be counted as if the absentee voters were voting in person. On November 8, 1994, Alabama held a general election for several statewide offices including Chief Justice of the Supreme Court of Alabama and Treasurer of the State of Alabama. Between 1000 and 2000 absentee voter failed to properly complete their affidavits, either by failing to have their signatures notarized or by failing to have them witnessed by two people. Because the affidavits were improperly completed, they were not counted in the election. Following the election, two absentee voters filed suit in the Circuit Court for Montgomery County, Alabama, seeking an order that the contested absentee ballots be counted. The circuit court granted the temporary restraining order stating that *"[a]bsentee ballots may not be excluded from being counted because of lack of notarization or a lack of witnesses." Id.* (emphasis in original). The circuit court required certification of the results of the election after the contested absentee ballots were included in the revised totals.

Subsequently, a voter suing on behalf of himself and others similarly situated brought suit in federal court under 42 U.S.C. § 1983 seeking an injunction against the election officials to preclude them from complying with the circuit court's order. The district court granted the injunction, finding that the past practice of the Alabama

election officials to the general election had been to retrain from counting any absentee ballot that did not include notarization or the signatures of two witnesses. The district court concluded that the defendant election officials were violating the Fourteenth Amendment. The court ordered that the officials refrain from certifying any election results based on a vote count that included the contested absentee ballots. The election officials appealed to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit affirmed the district court's decision. The court determined that although "federal courts do not involve themselves in 'garden variety' election disputes," they should intervene where "the election process itself reaches the point of patent and fundamental unfairness." *Id.* at 580. The court stated that "[s]uch a situation must go well beyond the ordinary dispute over the counting and marking of ballots." *Id.*

The court found that failing to exclude the contested absentee ballots constituted a post-election departure from previous practice in Alabama. The court based its holding that the post-election decision rendered the election fundamentally unfair upon the fact that the results were unforeseeable to the average voter. Specifically, the court stated, "[w]e consider it unreasonable to expect average voters and candidates to question the Secretary's, the Attorney General's, and the election officials' interpretation and application of the statue, especially in light of its plain language," *Id.* at 581.

In the instant case, Plaintiffs argue that the Hawaii Supreme Court's post-election determination that blank

votes should be counted as "no" votes constitutes a retroactive validation of a controlling number of votes. They claim that based upon long-standing practice, the Attorney General's interpretation, the election officials' interpretation and the election materials, it was completely unforeseeable for the public to know that blank votes would be counted as "no" votes. The court finds this case closely analogous to the *Roe* case, and finds the reasoning of the *Roe* court to be persuasive. If the voters casting a controlling number of blank ballots in the November 1996 election could not reasonably have known the meaning of their ballots, the election was fundamentally unfair.[8]

1. Foreseeabilty

Plaintiffs assert that reasonable voters could not have been expected to know that their blank ballots on the con-con question would have been later interpreted as "no" votes by the Hawaii Supreme Court. In support of this claim, Plaintiffs state that the public was led to believe that blank votes would not be counted for any purpose by: (1) the past practice of elections officials never to count blank votes for any purpose; (2) the information

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[8] The same argument pertains to voters who voted "yes" at the election, and those individuals and groups who had vigorously advocated for the con-con, such as Citizens for a Constitutional Convention. Those individuals could have chosen different strategies or informed the public otherwise had they known before the election of the subsequent meaning attached to blank votes. Thus, if the meaning was unforeseeable to the voting public, the election was fundamentally unfair.

disseminated by the Chief Elections officer orally, in writing and in the electronic media that blank votes would not count; (3) the prior opinion of the Attorney General; (4) Hawaii Revised Statute § 11-151(3); (5) Hawaii Supreme Court decision of *Republican Party of Hawaii v. Waihee*, 68 Haw. 258, 709 P.2d 980 (1985); and (6) the plain language of the Constitution itself.

In opposition, Defendants argue that the decision of the Hawaii Supreme Court was foreseeable because: (1) it was a reasonable interpretation of the Constitution; (2) the interpretation of the Hawaii Constitution was not well-settled and clear; (3) Byron W. Bender, a professor of linguistics at the University of Hawaii, believes that the Hawaii Supreme Court's interpretation was accurate; and (4) the fact that Plaintiffs misunderstood the law before the election does not make the election process unfair.

As a threshold matter, the court notes that both Plaintiffs and Defendants[9] spend significant amounts of time

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[9] In particular, the opposition of amicus curiae to Plaintiffs' motion for summary judgment was of little use to this court because it discussed, at great length, whether the decision of the Hawaii Supreme Court was correct. It is not the job of this court to determine the adequacy of the Hawaii Supreme Court's decision, and indeed, would be violative of the *Rooker-Feldman* doctrine. Moreover, such a determination is wholly irrelevant and unnecessary for this court to reach a conclusion concerning foreseeability in this case. Indeed, the question here is not whether the Hawaii Supreme Court was correct or incorrect in its interpretation of the Hawaii Constitution. The Hawaii Supreme Court is in fact the ultimate authority on the interpretation of the state constitution, and this court is bound by and respects its view. This case is premised not upon the Hawaii Constitution, but upon the United States Constitution

discussing the merits of the Hawaii Supreme Court's decision. The court does not have the authority to conduct such review. This inquiry is limited to whether the constitutional rights of the citizens of Hawaii have been violated by a post-election decision regarding whether blank votes should be counted as "no" votes.

Defendants have not come forth with evidence to refute Plaintiffs claims regarding the information disseminated prior to the election which informed voters that blank votes would not be counted. Instead, Defendants state that "there is no evidence that a significant number of voters saw a copy [of the Fact Sheets]" which were distributed to the public stating that blank votes would not count. They argue that as for information posted on the Internet, "there is no evidence that an appreciable number of voters saw that either." Defendants' Memo in Opp. at 16-17.

However, it is undisputed that the Fact Sheets were distributed to numerous members of the voting public at the polling places and otherwise. The question is one of fundamental fairness, not whether Plaintiffs can prove conclusively that if all voters had been clearly informed the result would have been different. More important is the fact that the elections office prepared the "Fact Sheet"

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and centers upon the question of whether the election was fundamentally unfair as judged by federal constitutional standards. Therefore even if the State Supreme Court's interpretation of how to count ballots should have always been as indicated in its recent decision, the question still remains whether the election was fundamentally unfair because voters were misled by elections officials and past practice that a different procedure would apply.

for distribution to all voters who requested information on voting, and for distribution to all poll workers who worked at the polls. Complaint at 8. The purpose of the Fact Sheets was to answer voters' questions regarding the constitutional convention. *Id.* The State elections office informed all voters and anyone who inquired, that in determining whether the con-con question would pass, blank ballots would not count for any purpose. *Id.* at 7. The elections office accomplished this orally, in writing and on the Internet. Based upon the elections office's belief that blank votes would not count, it affirmatively prohibited Citizens for a Constitutional Convention from telling voters that blank ballots would count.

Moreover, in the State of Hawaii, it has been the long-standing practice of the elections office not to count blank votes for any purpose. The Chief Elections Officer, Dwayne Yoshina,[10] testified at his deposition that blank ballots have never been counted in determining whether con-con questions had received a majority. Yoshina Depo. at 15. Blank ballots were not counted on the con-con question in either 1976 or 1986. *Id.* at 16. Specifically, Yoshina testified:

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[10] Mr. Yoshina is the Chief Elections Officer at the Elections Office for the State of Hawaii. He began working in the Elections Office in 1981 as an elections systems planner. He was appointed to the position of Deputy Executive Officer who oversaw day-to-day operations in 1986 or 1987, and he held that office until 1995-1996 when he was appointed Chief Elections officer. The Elections office is responsible for overseeing all aspects of the election and for disseminating to the public all information regarding election laws and matters on the ballot.

> it was the historical practice of [the office of Elections] and the Office of the Lieutenant Governor that in determining whether the con-con question received a majority, blank ballots did not count as ballots cast.

Id. at 17. He testified that prior to the Hawaii Supreme Court's interpretation of the Constitution, it was clear to his office that blank ballots would not be counted. *Id.* at 17-18. Yoshina and his office relied upon what they believed to be clear language in the Hawaii Revised Statutes and the Hawaii Constitution. *Id.* at 15.[11]

The relevant Hawaii Revised Statutes provides in its entirety as follows:

> Each contest or question on a ballot shall be counted independently as follows:
>
> (1) If the votes in a contest or question are equal to or less than the number to be elected or chosen for that contest or question, the votes for that contest or question shall be counted.

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[11] In deposition, Yoshina also stated that "it would have been impossible for voters to have known prior to the election that their blank ballots would count as ballots cast in determining whether or not there was a majority in favor of the con-con question." Yoshina Depo. at 21. He testified that "it is unfair to count the blank con-con ballots cast when the voters were specifically told that the blank ballots would not count as ballots cast." *Id.* at 22. This evidence refutes Defendants' assertions that the law regarding whether blank votes would be counted was ambiguous. Undoubtedly, the elections officials believed that the law was clear that blank votes would not be counted prior to the State Supreme Court's decision.

(2) If the votes cast in a contest or question exceed the number to be elected or chosen for that contest or question, the votes for that contest or question shall not be counted.

(3) *If a contest or question requires a majority of the votes for passage, any blank, spoiled, or invalid ballot shall not be tallied for passage or as votes cast except that such ballots shall be counted as votes cast in a ratification of a constitutional amendment.*

HRS § 11-151 (emphasis added).

The relevant portions of the Hawaii Constitution provide as follows:

> The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" If any nine-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period. . . . *If a majority of the ballots cast upon such a question be in the affirmative,* delegates to the convention shall be chosen at the next regular election unless the legislature shall provide for the election of delegates at a special election.

Haw. Const. Art. XVII § 2 (emphasis added).

Though the elections officials interpreted this language to mean that only ballots which were marked "yes" or "no" would be counted, the Hawaii Supreme Court later interpreted it differently. In its opinion, the

Hawaii Supreme Court interpreted the meaning of the language "ballots cast" and "upon such a question." It also considered the intent of the framers of the Hawaii Constitution in reaching its decision and concluded that the phrase "ballots cast upon such a question" required counting all voting ballots which were turned over to elections officials without regard to whether they voted affirmatively, negatively or not at all on any particular question on the ballot.[12] This court has no reason to determine the efficacy of the Hawaii Supreme Court's decision, and therefore will not address whether its decision was reasonable.[13] Rather, the issue is whether based upon the available information prior to the election, the average voter could have foreseen such an interpretation. This court concludes that the average voter could not.[14]

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[12] Plaintiffs also contend that the Hawaii Supreme court decision of *Republican Party of Hawaii v. Waihee*, 68 Haw. 258, 709 P.2d 980 (1985) demonstrates that blank votes are not counted in elections. In its decision concerning this case, the Hawaii Supreme Court distinguished its previous decision in *Republican Party*, stating that although the general view is that blank votes should not be counted, "whether that view has any application in a particular case depends on the particular wording of the charter, statutes or constitutional provision in question."

[13] One of Defendants' arguments is that the Hawaii Supreme Court's decision was foreseeable because it was reasonable. This begs the question. The real issue is whether Hawaii voters could have anticipated the Hawaii Supreme Court's decision in light of contrary direct information provided by elections officials.

[14] In the Hawaii Supreme Court's ruling, it concluded that in order to abstain on the con-con question, failing to mark "yes" or "no" was insufficient, a voter was required not to turn his ballot over to elections officials. However, at the 1996

Rather than countering Plaintiffs' evidence, Defendants arguments tend to support the conclusion that although the Hawaii Supreme Court's interpretation of the Hawaii Constitution may be the correct one, it was nonetheless unforeseeable to the average voter. The court finds little credibility to Defendants assertion that while "there is no evidence that any significant number of voters considered, or even saw, the Elections Office Fact Sheet or web page," average lay voters should have been expected to read, consider and comprehend the Hawaii Constitution and its legislative history in order to determine what their votes would mean. It is much more likely that the general public would be aware of information disseminated to it by elections officials, as opposed to the legislative history and language of specific articles of the Hawaii constitution. The Hawaii Supreme Court wrote a complex 22-page opinion explaining its interpretation of how blank votes should be counted on a con-con question, and the average lay voter could not be expected to discern likewise.[15]

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election, voters were required to turn in all ballots at once in order for any vote to be counted on the ballot. If this court were to give retroactive application to the Hawaii Supreme Court's decision, the result would be for those wishing to abstain on the con-con question to forfeit their right to vote on questions of national importance such as President and Vice President of the United States. While this ruling is now the state of the law in Hawaii, voters must be apprized in advance of an election of the fact that they are in essence, required to vote on the con-con question, unless they choose to abstain on every question on the ballot.

[15] For this same reason, Defendants' argument concerning the "plain language" of Article XVII § 2 of the Hawaii

In addition, Defendants argue at great length that state law was not well-settled, therefore, there could not have been a clear understanding among voters that blank ballots would not count. However, as mentioned previously, it is much less likely that average voters could seek out, find, understand and consider statutes and constitutional provisions, including legislative history that qualified attorneys have taken years to learn to interpret. Moreover, the court agrees with the Eleventh Circuit that, it would be "unreasonable to expect average voters and candidates to question the [Chief Elections Officer's], the Attorney General's and the election officials' interpretation and application of the [constitution and] statute" especially in light of the historical practice of the elections office and the information which was disseminated to the public.[16] This court finds, that based upon the

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Constitution, as interpreted by Byron W. Bender, Professor of Linguistics at the University of Hawaii, also fails. If determining the common usage of the phrase "ballots cast upon such a question" requires the interpretation of a professor of linguistics, that is strong evidence that the same is not readily knowable by an average voter. In fact, if a linguist's interpretation varies markedly from that of the average voter, than there is a strong indication that Plaintiffs' previous "misunderstanding of the law," was unforeseeable.

[16] Defendants also argue that because one newspaper article appearing in the *Honolulu Star Bulletin* in 1966, reported that blank ballots would be counted as "no" votes on the con-con question, Plaintiffs cannot show that they were harmed by misinformation by election officials. However, the court finds a 3-paragraph article written over 30 years ago by a lay reporter cannot counter the substantial inference to the contrary provided to voters by elections officials in this past election. Notwithstanding the article, the elections officials, in fact, did

information distributed to voters prior to the election, and based upon the fact that blank votes have never been counted for any purpose, there would be no reason for voters to assume that their blank ballots would be counted as "no" votes any more than they should assume that their blank votes would be counted as "yes" votes. Therefore, the court finds that the Hawaii Supreme Court's post-election decision rendered the election an the con-con question fundamentally unfair in violation of Plaintiffs' Fourteenth Amendment rights to due process of law.

A state's election laws which impairs First or Fourteenth Amendment rights of its citizens can survive constitutional scrutiny only by a showing that it addresses a compelling state interest and is narrowly tailored to serve that interest. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). Defendants have not come forth with any compelling interest advanced by the State. Their only argument is that the State's interest in requiring an extraordinary majority to call a constitutional convention in order to initiate changes to our "basic law" is rationally related to a legitimate public purpose. While there is no doubt that Hawaii is "free to place reasonable time, place, and manner restrictions on voting" such as requiring a supermajority on a con-con question, *Roe*, 43 F.3d at 580, there is no compelling interest supporting its retroactive application in this case.

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not count blank votes as "no" votes in the 1966 election. Thus, even 30 years ago, a person reading the article would be led to believe that the newspaper was wrong, and indeed, blank votes would not be counted for any purpose.

The action is insufficient to pass strict scrutiny. The only remaining question is one of remedy.[17]

III. Defendants' Cross-Motion for Summary Judgment

Defendants' filed a cross-motion for summary judgment on the grounds that: (1) Plaintiffs lack standing; (2) this suit is barred by the Eleventh Amendment; and (3) the election was not fundamentally unfair.[18]

A. *Standing*

While this court addressed this question in ruling on Plaintiffs' motion for summary judgment, it will be briefly addressed again here as Defendants raise slightly different arguments on standing in support of their cross-motion for summary judgment. Defendants argue that Plaintiffs cannot demonstrate that they have sustained injury for purposes of standing because to do so, they would have to rely upon how they voted. Defendants contend that because this could not be proven by admissible, competent evidence, Plaintiffs do not have standing. This argument lacks merit.

The Supreme Court of the United States has stated, "The right of suffrage can be denied by a debasement or

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[17] Because the court finds a constitutional deprivation, the court need not address Plaintiffs other arguments that the decision violated their substantive due process rights and equal protection rights.

[18] The court will not address this claim as it was previously addressed in the section regarding Plaintiffs' Motion for Summary Judgment.

dilution of the weight of the citizen's vote just as effectively as by wholly prohibiting the free exercise at the franchise." *Reynolds v. Simms*, 377 U.S. 533, 555 (1964). A voter's constitutional injury may arise not only by denial of the right to vote, but by the denial of a fundamentally fair election. *Roe*, 43 F.3d at 580.

As indicated above when addressing this issue in Plaintiffs' motion for summary judgment, Plaintiffs lost the right to a fundamentally fair election – a constitutional deprivation constituting an injury in and of itself. However, because the Hawaii Supreme Court's interpretation of the Hawaii Constitution resulted in a reversal of the election results, Plaintiffs also lost their right to a constitutional convention. Clearly, this is both a direct and significant injury as the opportunity for an election to call a constitutional convention in Hawaii only arises once every ten years. Once Plaintiffs are unconstitutionally deprived of the right to a fundamentally fair election on whether to have a con-con, they will not have another opportunity to exercise this right until the year 2006. This is not a harm which is contingent upon future events. The harm followed immediately upon the recounting of the votes, and the certification that the con-con did not pass. Moreover, Plaintiffs have shown causation because their injury was directly caused by specific acts of Defendants: (1) the reversal of Defendants' prior certification that the con-con passed; (2) the counting of blank votes as "no" votes; and (3) the certification that the con-con passed.

As a final effort, Defendants also make a slippery slope argument. They contend that this court should find that Plaintiffs lack standing because to do otherwise

would be to expand judicial oversight to any election dispute which is brought into federal court. This argument also lacks merit.

This court recognizes that elections should be overturned only in rare circumstances of clear constitutional deprivations. "Not every state election dispute, however, implicates the Due Process Clause of the Fourteenth Amendment." *Roe*, 43 F.3d at 580. The case presently before the court is not an ordinary election dispute. The post-election interpretation of the [sic] how blank votes should be counted on the con-con question was the first time in the history of Hawaii that a retroactive decision reversed the results of an election. Federal courts have a duty to uphold the United States Constitution, which is paramount to the Constitution of the State of Hawaii. This court would be derelict in its duties to the citizens of Hawaii, if it disregarded the Constitution when the citizens' voting rights have been so severely impaired. The court finds that Plaintiffs have sufficiently demonstrated their injury in this case. Notwithstanding this, while the members of a class must have suffered injury, the injury requirement is applied more flexibly in the class action context. *LaDuke v. Nelson*, 762 F.2d 1318, 1325-26 (9th Cir. 1985). Thus, this court finds that Plaintiffs have standing to bring the instant suit.

B. *Eleventh Amendment Immunity*

Plaintiffs have sued Defendants for constitutional violations as well as for violation of 42 U.S.C. § 1983. Defendants have asserted that the Eleventh Amendment

doctrine of sovereign immunity provides a complete defense. The Eleventh Amendment reads:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[19]

The Supreme Court has interpreted this Amendment to signify that "in the absence of consent, a suit in which the State or one of its agencies or departments is named as the defendant is proscribed[.]" *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Where state officials are the named defendants, the Eleventh Amendment bars the suit if " 'the state is the real, substantial party in interest.' " *Pennhurst*, 465 U.S. at 101, (*citing Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 464 (1945)). "Thus, '[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.' " *Id.* (*citing Hawaii v. Gordon*, 373 U.S. 57, 58 (1963))

Moreover, a plaintiff may not sue a state in either law or equity. *Id.* at 100-01 (*citing Missouri v. Fiske*, 290 U.S. 18, 27 (1933) ("the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when those are asserted and prosecuted by an individual against a State")). Reading these two principles together, a suit against a state official *that is in fact a suit against a State* is

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[19] The Supreme Court has held that this provision bars suits against a state brought by its own citizens, as well as by foreign citizens. *Papasan v. Allain*, 478 U.S. 265, 276 (1986).

barred regardless of whether the plaintiff seeks monetary or injunctive relief. *Id.* at 101-02 (*citing Cory v. White*, 457 U.S. 85, 91 (1982)) (emphasis added).

The Supreme Court has recognized an exception to this general rule: a plaintiff may challenge the constitutionality of a state official's action by seeking to enjoin the official from continuing to enforce allegedly unconstitutional state laws. *Id.* at 102 (*citing Ex Parte Young*, 209 U.S. 123 (1908)). If the plaintiff asks the federal court to enjoin the official's future unconstitutional conduct, the Eleventh Amendment presents no bar, because unconstitutional actions by state officials cannot be authorized by a state. *Edelman v. Jordan*, 415 U.S. 651 (1974). However, a plaintiff may not seek retroactive monetary relief against the state official for past allegedly unconstitutional behavior. *Id.* at 666-67.

Simply asking for injunctive relief and not damages will not automatically allow the plaintiff to overcome the dictates of the Eleventh Amendment. The Supreme Court has recognized that the difference between retrospective and prospective relief "will not in many instances be that between day and night." *Papasan*, 478 U.S. at 278 (*citing Edelman*, 415 U.S. at 667). Generally, "[r]elief that in essence serves to *compensate* a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred [by the Eleventh Amendment]." *Papasan*, 478 U.S. at 278 (emphasis added).

It is clear that in the case at bar, Plaintiffs do not seek retroactive monetary relief against state officials for past conduct. Nor do they seek compensation for past injuries. Plaintiffs seek prospective injunctive and declaratory

relief against Defendants with claims virtually identical to those of the plaintiffs in *Roe* and *Griffin*, 570 F.2d at 1065 (affirming district court's reversal of state's retroactive invalidation of absentee and shut-in ballots). Moreover, there is no merit to Defendants' argument that holding a new election would be an undue expense for the State.[20] Plaintiffs seek to enjoin Defendants' retroactive application of the Hawaii Supreme Court's ruling. Following this court's order, the Hawaii Supreme Court's interpretation of how blank votes should be counted on the con-con question can only be implemented prospectively – beginning with the next election. Thus, the court concludes that the Eleventh Amendment does not shield Defendants from relief in this case.

C. *Remedy*

In the *Roe* decision, the Eleventh Circuit determined that the state judicial decision resulted in a retroactive validation of a controlling number of votes. For that reason, a new election was not ordered, but rather the court enjoined the counting of those votes. The court in *Griffin* found that because the state court's post-election decision was retroactive, it ordered a new primary election, 570 F.2d at 1080.

In a similar vein, Plaintiffs seek reversal of the election results on the con-con question as the appropriate

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[20] "The Eleventh Amendment does not bar the imposition of costs to secure compliance with prospective relief or costs that are incidental or ancillary to prospective relief." *Hook v. Arizona Dep't of Corrections*, 107 F.3d 1397, 1403 (9th Cir. 1997).

remedy for the constitutional violation. However, Plaintiffs acknowledge that for due process violations, a new election may also be an appropriate remedy. *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988) ("Although we have the power to invalidate constitutionally infirm elections, we take into account equitable considerations in fashioning the appropriate remedy in each case.").

Defendants advance no equitable considerations in support of requiring a new election as opposed to a reversal of the election results. While this court may have the authority to order elections officials to certify the con-con question as having passed, to do so would result in imposing the same unfairness upon the election that this suit has sought to correct. The Hawaii Supreme Court has now determined that the Hawaii Constitution requires that blank ballots cast are to be counted as "no" votes on the question. If this court orders elections officials to certify the question as having passed, the result will be the calling of a state Constitutional Convention based upon an election held in violation of the Hawaii Supreme Court's interpretation of the State Constitution. While Hawaii voters could not have foreseen the Hawaii Supreme Court's recent ruling prior to the election, it is nonetheless the law of the State of Hawaii and must be respected.

It is also true, for the reasons stated in this order, that to allow the election to remain certified as having failed passage would violate the United States Constitution's guarantee of fundamental fairness in elections. This court concludes that the only appropriate, proper, and equitable remedy is to order a new election, and by that election

give the people of Hawaii a fair opportunity to vote upon the question of whether there should be a Constitutional Convention. In this new election, voters will be fully informed of the consequences of their vote. Those in favor of a Constitutional Convention, as well as those opposed to it, will have an equal and fair opportunity to address voters prior to the election. Most importantly, the requirements of both the Hawaii State Constitution and the United States Constitution will be met.

Therefore, Plaintiffs' motion for Summary Judgment is hereby GRANTED, the results of the Constitutional Convention election held in 1996 are declared void, and Defendants are ordered to hold a new special election on the question of whether a Constitutional Convention should be held. That election is ordered to take place within 60 days pursuant to HRS § 11-174.5.

CONCLUSION

For the reasons stated above, the court GRANTS Plaintiffs' Motion for Class Certification, GRANTS Plaintiffs' Motion for Summary Judgment, DENIES Defendants' Cross-Motion for Summary Judgment, and ORDERS a Special Election.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 10, 1997.

/s/ David A. Ezra
DAVID ALAN EZRA
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARK J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, JERRY BECK, LET THE PEOPLE DECIDE, AND CITIZENS FOR A CONSTITUTIONAL CONVENTION, ON BEHALF OF THEMSELVES, AND OTHERS SIMILARLY SITUATED, Plaintiffs. vs. DWAYNE D. YOSHINA, CHIEF ELECTION OFFICER OF THE STATE OF HAWAII; OFFICE OF ELECTIONS, STATE OF HAWAII; MAZIE K. HIRONO, LIEUTENANT GOVERNOR OF THE STATE OF HAWAII; IN THEIR OFFICIAL CAPACITIES, Defendants.	CV. NO. 97-00322 DAE

(Filed July 25, 1997)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO STAY PENDING APPEAL

The court heard Defendants' Motion on July 25, 1997. Mark J. Bennett, Esq., appeared at the hearing on behalf of Plaintiffs; Deputy Attorney General John P. Dellers,

appeared at the hearing on behalf of Defendants. After reviewing the motion and the supporting and opposing memoranda, the court **GRANTS** in part and **DENIES** in part Defendants' Motion to Stay Pending Appeal.

BACKGROUND

The facts of this case have been fully set forth in this court's Order Granting Plaintiffs' Motion for Class Certification and Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Cross-Motion for Summary Judgment and Ordering Special Election filed on July 10, 1997. Those facts will not be repeated here.

STANDARD OF REVIEW

The Federal Rules of Civil Procedure provide the procedure for a court to order a stay of proceedings to enforce a judgment as follows:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Fed. R. Civ. P. 62(c). The filing of a notice of appeal divests a district court of jurisdiction only over those aspects of the case involved in the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). A court has power to stay an injunction pending appeal,

however, "the powers of the district court over an injunction pending appeal should be limited to maintaining the status quo. . . . " *Coastal Corp. v. Texas E. Corp.*, 869 F.2d 817, 820 (5th Cir. 1989). In order for a party to prevail in his motion for a stay or modification pending appeal, he must demonstrate: (1) the likelihood of prevailing on the merits on appeal; (2) the likelihood of suffering irreparable injury if the stay is denied; (3) the other parties involved will not be substantially harmed by the granting of the stay; and (4) the granting of the stay will serve the public interest. *Stop H-3 Association v. Volpe*, 353 F. Supp. 14, 16 (D. Haw. 1972).

A second standard requires that the moving party demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships weighs sharply in his favor. *Estate of Daily v. Title Guar. Escrow Service, Inc.*, 178 B.R. 837, 847 (D. Haw. 1995). Under the second analysis, the critical inquiry is weighing the relative hardship to the parties if the stay is granted or denied. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983).

DISCUSSION

I. Likelihood of Success on the Merits

Defendants contend that they have a likelihood of success on the merits because: (1) the Eleventh Amendment bars this suit; and (2) this court erred in its determination of facts essential to the judgment.

A. Eleventh Amendment Immunity

Once again, Defendants raise the argument that this suit is barred by the Eleventh Amendment. Defendants argue that this court erred in concluding that Plaintiffs' claims were prospective, and by concluding that this case is not about past events.

Though the Eleventh Amendment prevents a plaintiff from suing a state in law or equity, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984), a plaintiff may challenge the constitutionality of a state official's action by seeking to enjoin the official from enforcing allegedly unconstitutional state laws. *Id.* at 102. The Supreme Court held that "the Amendment grants the States an immunity from retroactive monetary relief, [yet] it reaffirmed the principle that state officers are not immune from prospective injunctive relief." *Hutto v. Finney*, 437 U.S. 678, 690 (1978); *Pennhurst*, 465 U.S. at 103 ("the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief."). The Eleventh Amendment does not prevent a court from granting injunctive relief even though compliance with the injunction will cost the state large sums of money in the future. *Quern v. Jordan*, 440 U.S. 332 (1979).

The Supreme Court has determined that prospective or ancillary relief is not barred by the Eleventh Amendment. *Graham v. Richardson*, 403 U.S. 365 (1971) (ordering injunction compelling state officers to grant welfare benefits to otherwise qualified recipients who were aliens even though it cost the state treasuries large sums of

money). The *Pennhurst* Court explained that the distinction between prospective and retroactive relief "will not in many instances be that between day and night." *Pennhurst*, 465 U.S. at 105. However, the Eleventh Amendment is concerned with retroactive relief that will be paid by the state, while prospective relief is simply an order to comply with the law, where the costs are incidental to the state's obligation to act in accordance with federal law. Erwin Chemerinsky, *Federal Jurisdiction* 397 (2d Ed. 1994).[1]

The Hawaii Supreme Court rendered its decision on how blank votes should be counted, months after the November election had passed. Once the Hawaii Supreme Court retroactively applied its interpretation of how blank votes should be counted on the con-con question, the citizens of the State of Hawaii were immediately deprived of their right to a fundamentally fair election on the con-con question. This harm is ongoing. The harm continues until the voters of Hawaii are granted a fundamentally fair election on the con-con question. The next election in which the con-con question will be placed on the ballot is in the year 2006. Surely this court is not

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[1] For instance in *Milliken v. Bradley*, 433 U.S. 267 (1977), the Supreme Court upheld a school desegregation order, including several remedial and compensatory education programs which required the expenditure of state funds. The court held that the educational components were ordered into effect prospectively, and were designed to extinguish continuing conditions of inequality produced by the unequal school system maintained in Detroit. The court found that the plan "operate[d] *prospectively* to bring about the delayed benefits of a unitary school system," *Id.* at 289-290 (emphasis in original).

without authority to remedy a constitutional harm which is presently occurring and scheduled to continue for the next ten years.

Taking Defendants' argument to its logical conclusion, states would, for instance, be free to retroactively enact and apply criminal laws to individuals who had no prior notice that their acts would later be considered crimes. Even under such circumstances of egregious constitutional violations, federal courts would be without power to enjoin retroactive application of the statute because it is considered a past event. Plaintiffs in this case have sought to enjoin this present, and potentially future harm of deprivation of a fundamentally fair election. The Eleventh Amendment does not present a bar.[2]

B. Facts Essential to Judgment on the Merits

Defendants argue that this court erred in concluding that "Fact Sheets" were distributed to numerous members of the voting public at the polling places and otherwise, and that the elections officials informed the public that blank votes would not count on the con-con question. Rather, Defendants contend that "precinct information sheets," which were not included in the record, were distributed to voters.

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[2] Moreover, the Eleventh Amendment does not bar suits for declaratory relief where the plaintiff claims a continuing violation of federal law or a threat of future violation. *Green v. Mansour*, 474 U.S. 64, 72-73 (1985). Thus, the Eleventh Amendment does not preclude declaratory relief as an appropriate remedy in this case.

Defendants argue semantics. Both the fact sheets and the precinct information sheets[3] contained very similar information regarding how their votes would be counted. The Chief Elections Officer testified at deposition that the purpose of that information was to inform the public of how the votes would be counted on the con-con question. Yoshina Depo. at 42. In addition, he testified that the polling and elections personnel were given the information to inform all members of the public who inquired, that blank votes would not be counted for the con-con question. *Id.* at 11-13. In any event, Defendants seek to dissect these facts from the whole. Given the widespread and uniform elections procedures including: (1) distributing the fact sheets, (2) distributing the precinct information sheets, (3) posting information on a web page on the Internet, (4) state-wide distribution to all print and electronic media, (5) prohibiting Citizens for a Constitutional Convention from telling voters that blank votes would, in fact, count, and (6) informing all inquiring voters that blank votes would not count, a reasonable voter would have no reason to disbelieve the affirmative misrepresentations of the elections office.

Defendants also dispute this court's determination that it has been the long-standing practice of the elections office not to count blank votes for any purpose. This argument fails as the evidence was supported by the deposition testimony of the Chief Elections Officer, Dwayne Yoshina, who is well seasoned and qualified to

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[3] A copy of the precinct information sheet was attached to Plaintiffs' Motion for Summary Judgment and Permanent Injunction as Exhibit 8.

testify as to the past practice of the elections office. Moreover, at the hearing, Defendants' counsel specifically admitted that the Attorney General took the position before the Hawaii Supreme Court that it was clear that under the Hawaii Constitution, blank votes are not to be counted on the con-con question. Because the evidence concerning the fundamental unfairness of the election was overwhelming, this court found a constitutional violation to exist. Under the facts and circumstances of this case, the court finds that Defendants have a marginal likelihood of success on the merits.

II. Injury or Hardship to Defendants if Stay is Not Granted

Defendants only argument regarding potential harm if the stay is not granted is as follows:

> In the absence of a stay, the State will be required to hold a new con-con vote before the Court of Appeals can consider its appeal, since once the vote is conducted, prosecution of the appeal would be pointless. If the voters rejected the call for a convention, the controversy would be at an end. If they approved the call, it would be impractical for Defendants to prosecute their appeal.

Motion at 10. Defendants have not demonstrated how any of the aforementioned results would thwart their ability to appeal. If the election is conducted prior to the Court of Appeals' ruling on the issue, and the con-con is approved, Defendants would still be entitled to appeal. In fact, Defendants would have ample time to have their appeal heard prior to the convening and resolution of the

actual constitutional convention. In addition, if the concon was rejected, an appeal would be unnecessary. While the election itself may cause inconvenience and some expense, it in no way rises to the level of irreparable harm alleged by Defendants. For example, the State legislature has provided for special elections to be held in the event of a death of a Congressman. *See* H.R.S. § 17-2. While the expense associated with such an event may be inconvenient[4] and costly, it in no way constitutes irreparable injury. The expenditure of funds, or the difficulties that the Elections Office would encounter in conducting the election do not constitute irreparable injury.

III. Harm to Plaintiffs if Stay is Granted

Defendants claim that the harm to Plaintiffs is minimal if a stay is granted because the earliest that delegates could be elected is November 1998. Because the convention must convene "not less than five months prior to the next regularly scheduled election," the proposed amendments could be submitted to the voters no sooner than November of 2000. Thus, Defendants argue, a stay of the judgment pending appeal would not cause substantial harm to Plaintiffs. This argument is without merit.

If a special election is held in the fall of 1997, the legislature will have enough to [sic] time to allow for the

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[4] The court notes that Mr. Yoshina testified at the hearing that conducting the special election is not an inconvenience, as it is his job to conduct such elections.

election of delegates in May 1998, allow for the convention in 1998, and allow for any amendments to be on the 1998 general election ballot.[5]

On the other hand, Plaintiffs would be subjected to substantial hardship if the stay is granted. This court agrees that denying the citizens of Hawaii their opportunity to vote on this important issue in a fundamentally fair election constitutes a hardship far in excess of the consequent administrative and cost burden on the State. The citizens' fundamental voting rights are paramount to the State's interest in saving time and money.

Delay of the election until the appeal is complete and decided could potentially take anywhere from one to three years. The entire process of approving a con-con, electing the delegates convening a convention, and approving or disapproving amendments is time-consuming in and of itself. This burden is substantial as even

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[5] Amicus Curiae Republican Party of Hawaii submitted a Memorandum in Opposition to Defendants' Motion for Stay Pending Appeal on July 24, 1997. The Amicus contend that if a special election were held in 1997, a Constitutional Convention could conceivably take place within the following year. Attached to the memorandum as Exhibit A is a Declaration of David A. Pendleton. Pendleton is the sitting member of the House of Representatives of the State of Hawaii for the 50th State District. Based on his personal knowledge of the legislative process, Pendleton claims that if the election on the con-con question was held in 1997, the Legislature convening in January of 1998 would be able to address the enabling and appropriation issues which must take place to pass legislation into law. The constitutional convention itself could be held in 1998. Pendleton Decl. at 2-3.

postponing the con-con vote until the 1998 general election would set the process back by one to two years because the delegates would not be elected in 1998. For these reasons, the court finds that Defendants' request to stay the proceedings pending the decision on appeal or even until the 1998 general election, is entirely unreasonable. This court rejects that recommendation.

IV. Public Interest

Defendants argue that the public interest would be served by staying the election pending appeal. Specifically, Defendants point to the declaration of Mr. Yoshina who testifies that the 60-day time-table for special elections established by the state Legislature in H.R.S. § 11-174.5(b) is unreasonable in this case because it would require a great expenditure of time and resources.[6] Furthermore, it would require curtailing of elections activities including installation of an updated version of its present ballot counting system, adoption of new rules

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[6] At the hearing, Defendants suggested that substantial funds and resources would be spent on voter education and information. This argument is without support however, as the public has been well-informed of the only question that will be placed on the ballot – whether a convention should be convened. Yoshina testified that much of the work for a special election has already been completed. For instance, 70% of the polling places have been committed for the election, and revising fact sheets and modifying web sites take about one week. Most of the preparation for a special election would take from 2 to 4 months. It appears that bulk of the burden is not the time or expense but the taxing of resources on Yoshina's staff of 18 persons. However, Yoshina added that the elections office works closely with the county clerks who help put on elections.

and regulations, and installation of a new election information management system. However, other than making ballot counting more efficient, Yoshina's testimony did not explain how these activities benefit the public at large, nor why these activities could not continue after the special election.

Yoshina testified at the hearing that while he did not think a special election could not be conducted properly by September 9, 1997, he believes that one could be conducted within 120 days of this court's grant of the injunction, or November of 1997. This court has previously determined that the voters of Hawaii were denied the right to participate in a fundamentally fair election, in which the only equitable remedy is to hold a new election. As such, the public interest favors enjoining that constitutional violation as soon as possible. Moreover, if the citizens of Hawaii do approve a Constitutional Convention, then the public interest also favors holding that convention as soon as possible. The public interest in having an election which comports with the United States Constitution outweighs the public interest in for instance, installation of an updated version of the present ballot counting system.

Under either standard for granting a stay, the balance of the equities tips sharply in favor of the public interest in having a fundamentally fair election on whether a Constitutional Convention should be convened.

This court was indeed required to look to state law in determining when to hold a special election. Title 42 of the United States Code § 1988 provides in relevant part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of the Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, . . . shall be exercised and enforced *in conformity with the laws of the United States,* so far as such laws are suitable to carry the same into effect. . . . *but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies* . . . the common law, . . . and *statutes of the State . . . shall be extended to and govern the said courts in the trial and disposition of the cause. . . .*

42 U.S.C. § 1988. In this case, federal law did not provide an explicit remedy, therefore, the court appropriately looked to state law. However, the court has equitable latitude under federal law to modify or suspend an injunction pending appeal where appropriate. *See* Fed. R. Civ. P. 62(c). The court finds that the public interest is not substantially burdened by a limited suspension of the injunction, therefore the special election will be held no later than December 2, 1997.[7] Thus, the court GRANTS in part and DENIES in part, Defendants' Motion for Stay Pending Appeal.

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[7] The court notes that on the one hand the Defendants take issue with this court's ruling arguing that this court has somehow interfered with "states rights" and ignored state law. On the other hand, Defendants argue that this court should disregard the plain language of the state statute which provides for a special election within 60 days. *See* H.R.S. § 11-174.5(b).

CONCLUSION

For the reasons stated above, the court GRANTS in part and DENIES in part Defendants' Motion to Stay Pending Appeal.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 25, 1997.

/s/ David A. Ezra
DAVID ALAN EZRA
UNITED STATES
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARK J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, JERRY BECK, LET THE PEOPLE DECIDE, AND CITIZENS FOR A CONSTITUTIONAL CONVENTION, ON BEHALF OF THEMSELVES, AND OTHERS SIMILARLY SITUATED, Plaintiffs, vs. DWAYNE D. YOSHINA, CHIEF ELECTION OFFICER OF THE STATE OF HAWAII; OFFICE OF ELECTIONS, STATE OF HAWAII; MAZIE K. HIRONO, LIEUTENANT GOVERNOR OF THE STATE OF HAWAII; IN THEIR OFFICIAL CAPACITIES, Defendants.	CV. No. 97-00322 DAE

(Filed Jul. 29, 1997)

ORDER GRANTING DEFENDANTS' ORAL MOTION TO MODIFY ORDER FILED JULY 25, 1997

The court heard Defendants' oral motion on July 29, 1997. Mark J. Bennett, Esq., appeared at the hearing on

behalf of Plaintiffs; Deputy Attorney General Dorothy Sellers, appeared at the hearing on behalf of Defendants.

Defendants made an oral motion to modify this court's Order Granting in Part and Denying in Part Defendants' Motion to Stay Pending Appeal filed on July 25, 1997 ("July 25, 1997 Order"). Defendants' oral motion requested that the election be held no later than Saturday December 6, 1997, rather than no later than Tuesday December 2, 1997. The request was made because the polling places, such as schools, are unavailable for use during the week. Plaintiffs do not oppose this request. This court having found good cause shown, hereby modifies the July 25, 1997 Order to require that the special election be held *no later than December 6, 1997.*

For the reasons stated above, the court GRANTS Defendants' Oral Motion to Modify Order filed July 25, 1997.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JUL 29 1997.

/s/ David A. Ezra
DAVID ALAN EZRA
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK J. BENNETT, AUSA, et al., Plaintiffs/appellees/ cross-appellants, vs. DWAYNE D. YOSHINA, Chief, Elections Officer of the State of Hawaii, et al., Defendants/appellants/ cross-appellees, and HAWAII STATE AFL-CIO, et al. Defendants-Intervenors.	Nos. 97-16408, 97-16540 DC# CV-97-322-DAE Hawaii
MARK J. BENNETT, AUSA, et al., Plaintiffs-Appellees, vs. DWAYNE D. YOSHINA, Chief, Elections Officer of the State of Hawaii, et al., Defendants, and HAWAII STATE AFL-CIO, et al., Defendants-Intervenors-Appellants.	No. 97-16543 DC# CV-97-322-DAE Hawaii ORDER

(Filed Sep. 10, 1997)

Before: HALL and BRUNETTI, Circuit Judges

The motions of Hawaii State AFL-CIO and the Republican Party of Hawaii for leave to file *amicus curiae* briefs relating to the motion for stay are granted.

The motion for stay pending appeal and for an expedited briefing schedule is granted. Accordingly, the district court's order requiring the State of Hawaii to conduct a special election no later than December 6, 1997 is stayed.

Appeal no. 97-16543 is consolidated with cross-appeal nos. 97-16408 and 97-16540.

The following briefing schedule governs these appeals:

Appeal nos. 97-16408, 97-16540	Due Date
Appellants/cross-appellees' opening brief	October 10, 1997
Appellees/cross-appellants' answering/opening brief	November 10, 1997
Appellants/cross-appellees' reply/answering brief	November 24, 1997
Appellees/cross-appellants' optional reply brief	December 1, 1997

Appeal no. 97-16543	
Appellants' opening brief	October 10, 1997
Appellants' answering brief	November 10, 1997
Appellants' optional reply brief	November 24, 1997

The Clerk shall calendar this case during any week in January 1998 in San Francisco. Requests for extensions of time shall not be granted.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARK J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, JERRY BECK, LET THE PEOPLE DECIDE, AND CITIZENS FOR A CONSTITUTIONAL CONVENTION, ON BEHALF OF THEMSELVES, AND OTHERS SIMILARLY SITUATED, Plaintiffs, vs. DWAYNE D. YOSHINA, CHIEF ELECTION OFFICER OF THE STATE OF HAWAII; OFFICE OF ELECTIONS, STATE OF HAWAII; MAZIE K. HIRONO, LIEUTENANT GOVERNOR OF THE STATE OF HAWAII; IN THEIR OFFICIAL CAPACITIES, Defendants.	CV. NO. 97-00322 DAE

(Filed Sep. 26, 1997)

ORDER DENYING DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT

Pursuant to Local Rule 220-2(d), the court finds this matter suitable for disposition without a hearing. After reviewing the motion and the supporting and opposing

memoranda, the court DENIES Defendants' Motion for Relief from Judgment.

BACKGROUND

The facts of this case have been fully set forth in this court's Order Granting Plaintiffs' Motion for Class Certification and Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Cross-Motion for Summary Judgment and Ordering Special Election filed on July 10, 1997 (July 10, 1997 Order). Those facts will not be repeated here.

The only facts pertinent to the instant motion are as follows. The judgment was entered in this case on July 11, 1997, one day after the July 10, 1997 Order was filed. Defendants' notice of appeal was filed four days after judgment was entered. On August 1, 1997, Defendants filed a Motion for Relief from Judgment and for Hearing on Motion.[1]

It is well settled that "when a judgment is appealed, jurisdiction over the case passes to the appellate court. The filing of a notice of appeal generally divests the district court of jurisdiction over the matters appealed." *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir.), *cert. denied*, 459 U.S. 1071 (1982); *Davis v. United States*, 667 F.2d 822, 824 (9th Cir. 1982). Certain exceptions to this rule have been recognized. The district court may act to assist the court of appeals in the exercise of its jurisdiction; the district court

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[1] The court notes that this motion cannot be construed as a Rule 59 motion as it was not filed within the 10-day time limit.

may retain jurisdiction under specific statutory authority; or where an appeal is taken from an order granting or denying an injunction, the district court may suspend, modify, restore, or grant an injunction to preserve the status quo. *McClatchy Newspapers*, 686 F.2d at 734.

None of these circumstances are present in the instant case. Rather, Defendants ask this court to reconsider the issues determined in the July 10, 1997 Order currently on appeal. This court has no jurisdiction to dispose of the motion without a remand from the Ninth Circuit. *Gould v. Mutual Life Ins. Co.*, 790 F.2d 769 (9th Cir. 1986) (filing of notice of appeal divests district court of jurisdiction to consider motion to vacate judgment); *Smith v. Lujan*, 588 F.2d 1304, 1307 (9th Cir. 1979) (same).

Without explanation, Defendants cite the case of *Stone v. Immigration and Naturalization Serv.*, 514 U.S. 386 (1995), for the assertion that this court nevertheless has jurisdiction to consider the Rule 60(b) motion. This court disagrees.

> In *Stone*, the Court held that under the Immigration and Nationality Act ("INA"), a timely motion for reconsideration of a Board of Immigration Appeals decision does not toll the running of the statute of limitations for filing an appeal in federal court. The Court clarified that its ruling "depart[ed] from the ordinary judicial treatment of agency orders under reconsideration," because Congress intended INA to be different from other judicial review statutes.

Acura of Bellevue v. Reich, 90 F.3d 1403, 1407 n.1 (9th Cir. 1996). Thus, *Stone* is pertinent only insofar as it relates to the finality of agency decisions involving immigration

matters. *See Pablo v. INS*, 72 F.3d 110, 113 (9th Cir. 1995) (explaining how Stone overruled *Padilla-Agustin v. INS*, 21 F.3d 970, (9th Cir. 1994) and *Ogio v. INS*, 2 F.3d 959, (9th Cir. 1993)). This case contains no such issues. In fact, *Stone* articulated the rule stating that: "[o]ther motions, such as Rule 60(b) motions filed more than 10 days after judgment, do not affect the finality of a district court's judgment, either when filed before the appeal (no tolling), or afterwards (*appellate court jurisdiction not divested*)." *Stone*, 514 U.S. at 1548 (emphasis added). Because this court, rather than the appellate court has been divested of jurisdiction by the filing of the appeal, this court lacks the authority to hear the Rule 60(b) motion absent a remand from the Ninth Circuit.

CONCLUSION

For the reasons stated above, the court DENIES Applicants' Motion for Relief from Judgment.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, SEP 26 1997.

/s/ David A. Ezra
DAVID ALAN EZRA
UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARK J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, JERRY BECK, LET THE PEOPLE DECIDE, AND CITIZENS FOR A CONSTITUTIONAL CONVENTION, ON BEHALF OF THEMSELVES, AND OTHERS SIMILARLY SITUATED, Plaintiffs, vs. DWAYNE D. YOSHINA, CHIEF ELECTION OFFICER OF THE STATE OF HAWAII; OFFICE OF ELECTIONS, STATE OF HAWAII; MAZIE K. HIRONO, LIEUTENANT GOVERNOR OF THE STATE OF HAWAII; IN THEIR OFFICIAL CAPACITIES. Defendants.	CV. NO. 97-00322 DAE

(Filed Nov. 17, 1997)

ORDER DENYING DEFENDANTS' EX-PARTE MOTION FOR AN ORDER SHORTENING TIME AND FOR EXPEDITED HEARING; DENYING DEFENDANTS' MOTION TO EXTEND TIME FOR FILING NOTICE OF APPEAL

Pursuant to Local Rule 7.2 (d), the court finds this matter suitable for disposition without a hearing. After reviewing Defendants' motion and the supporting memoranda, the court DENIES Defendants' Ex-Parte Motion

for an Order Shortening Time and for Expedited Hearing and DENIES Defendants' Motion to Extend Time for Filing Notice of Appeal.

The court finds that Defendants have not shown good cause or excusable neglect to warrant an extension of time to file an appeal under Federal Rule of Appellate Procedure 4(a)(5). The court notes that Defendants have already filed a notice of appeal of the court's order denying Defendants' motion for reconsideration on September 29, 1997. However, Defendants voluntarily withdrew their notice of appeal on October 3, 1997.[1] As Defendants clearly had sufficient time to file a notice of appeal of the court's order, the court finds that it is inappropriate to grant Defendants a further extension of time under Rule 4(a)(4). The court also finds that an extension of time is not warranted in light of the fact that Defendants' appeal on the merits of this case has already been granted by the Ninth Circuit and the Ninth Circuit has established an expedited briefing schedule for this case.

Accordingly, the court DENIES Defendants' Ex-Parte Motion for an Order Shortening Time and for Expedited Hearing and DENIES Defendants' Motion to Extend Time for Filing Notice of Appeal.

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[1] Defendants withdrew their notice of appeal, in part, because they wanted to first obtain a ruling from this court on their second motion for reconsideration. However, in their second motion, Defendants do not raise any new arguments which were not previously addressed by the court in its order Denying Defendants' motion for Reconsideration, filed September 26, 1997.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, Nov. 17, 1997.

/s/ David A. Ezra
DAVID ALAN EZRA
UNITED STATES
DISTRICT JUDGE

APPENDIX I

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARK J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, JERRY BECK, LET THE PEOPLE DECIDE, AND CITIZENS FOR A CONSTITUTIONAL CONVENTION, ON BEHALF OF THEMSELVES, AND OTHERS SIMILARLY SITUATED, Plaintiffs, vs. DWAYNE D. YOSHINA, CHIEF ELECTION OFFICER OF THE STATE OF HAWAII; OFFICE OF ELECTIONS, STATE OF HAWAII; MAZIE K. HIRONO, LIEUTENANT GOVERNOR OF THE STATE OF HAWAII; IN THEIR OFFICIAL CAPACITIES, Defendants.	CV. NO. 97-00322 DAE

(Filed Nov. 18, 1997)

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION

Pursuant to Local Rule 7.2 (d), the court finds this matter suitable for disposition without a hearing. After

reviewing Defendants' motion and the supporting memoranda, the court DENIES Defendants' Motion for Reconsideration.

BACKGROUND

On September 26, 1997, this court issued an order Denying Defendants' Motion for Relief from Judgment. In the September 26 order, the court held that it had no jurisdiction to consider Defendants' motion as Defendants had already filed a notice of appeal with the Ninth Circuit. On October 3, 1997, Defendants filed the instant Motion for Reconsideration of the court's September 26, 1997 Order, contending that the court did have jurisdiction to consider Defendants' Motion for Relief from Judgment.

STANDARD OF REVIEW

The disposition of a motion for reconsideration is within the discretion of the district court and will not be reversed absent an abuse of discretion. *Plotkin v. Pacific Telephone & Telegraph Co.*, 688 F.2d 1291, 1292 (9th Cir. 1982) There in a "compelling interest in the finality of judgments which should not be lightly disregarded." *Rogers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983).

The Ninth Circuit has articulated two goals that must be accomplished in order for a motion for reconsideration to succeed: "First, a motion for reconsideration must demonstrate some reason why the court should reconsider its prior decision. Second, a motion for reconsideration must set forth facts or law of a strongly convincing

nature to induce the court to reverse its prior decision." *Stein v. State Farm Mutual Automobile Insurance Company*, 934 F. Supp. 1171, 1173 (D. Haw. 1996) Courts have established only three grounds justifying reconsideration: 1) an intervening change in controlling law; 2) the availability of new evidence; and, 3) the need to correct clear error or to prevent manifest injustice. *Great Hawaiian Financial Corp. v. Aiu*, 116 F.R.D. 612, 616 (D. Haw. 1987), rev'd on other grounds, 863 F.2d 517 (9th Cir. 1988).

DISCUSSION

In support of their Motion for Reconsideration, Defendants only make one argument. Defendants assert that this court incorrectly interpreted *Stone v. Immigration and Naturalization Service*, 514 U.S. 386 (1995), and that if the court had correctly interpreted the *Stone* case, the court would have concluded that it had jurisdiction to consider Defendants' Motion for Relief from Judgment. Defendants make no other arguments and present no other evidence in support of their Motion for Reconsideration.

In the September 26 order, this court quoted at length from the *Stone* decision and thoroughly discussed its impact on other Ninth Circuit cases which had concluded that an appeal generally divests a district court of jurisdiction to consider a Rule 60(b) motion. As noted in the September 26 order, the *Stone* case "held that under the Immigration and Nationality Act ("INA"), a timely motion for reconsideration of a Board of immigration Appeals decision does not toll the running of the statute of limitations for filing an appeal in federal court." *Acura*

of Bellevue v. Reich, 90 F.3d 1403, 1407 n.1 (9th Cir. 1996). That was the holding of the *Stone* decision.

In dicta, the Court discussed the effect of an appeal on a Rule 60(b) motion. However, even in this dicta, the Court was only discussing whether the *appellate* court had jurisdiction once a Rule 60(b) motion was filed in district court. *See Stone*, 514 U.S. at 401-03. The *Stone* decision does not therefore support Defendants' contention that this court has jurisdiction to consider Defendants' Motion for Relief from Judgment.

Instead, this court is bound by the Ninth Circuit cases which have directly addressed this issue and have concluded that the filing of an appeal generally divests the court of jurisdiction to consider a Rule 60(b) motion. *See, e.g., Bermudez v. Duenas*, 936 F.2d 1064, 1068 (9th Cir. 1991) ("The filing of a notice of appeal generally divests the district court of jurisdiction over the matters appealed."); *Zambrano v. Tafollau*, 885 F.2d 1473, 1476 n.7 (9th Cir. 1989); *Donovan v. Mazzola*, 761 F.2d 1411, 1414 (9th Cir. 1984) ("The Ninth Circuit follows the general rule, with some exceptions, that the filing of a notice of appeal divests the district court of jurisdiction over the matters appealed."); *Miranda v. Southern Pacific Transportation Co.*, 710 F.2d 516, 519 (9th Cir. 1983); *Davis v. United States*, 667 F.2d 822, 824 (9th Cir. 1982). The court therefore concludes that the September 26 Order Denying Defendants' Motion for Relief from Judgment was not clearly erroneous.

However, even if the court were to address the merits of Defendants' Motion for Relief from Judgment, the court would still conclude that Defendants' motion

should be denied. On July 11, 1997, this court issued an order Granting Plaintiffs' Motion for Class Certification and Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Cross-Motion for Summary Judgment and Ordering Special Election. In their motion for reconsideration, Defendants only address the court's decision to grant Plaintiffs' Motion for Summary Judgment.

In granting Plaintiffs' motion for summary judgment, this court concluded that, because the average voter had no way of knowing that blank ballots would be counted as no votes prior to the con-con election, the election was fundamentally unfair and in violation of Plaintiffs' Fourteenth Amendment right to due process. *See* Order, filed July 10, 1997, at 30. Defendants contend that the court's decision was clearly erroneous in light of the fact that less than 25 voters actually saw the Fact Sheet prepared by the Office of Elections, which indicated that blank votes would not be counted in the election.

In making this argument, however, Defendants entirely discount the fact that the court's decision was not based exclusively on a finding that the voters who read the Fact Sheet were mistakenly informed that blank votes would not be counted in the election. The court relied on a number of additional factors in concluding that the counting of blank votes as no votes rendered the election fundamentally unfair. Prior to the con-con election in 1996, blank votes had never been counted in a con-con election. As Chief Elections Officer Mr. Dwayne Yoshina testified, blank ballots were not counted on the con-con

question in either the 1976 or 1986 election. *See*, Deposition of Mr. Yoshina, p. 16. The court also based its decision on the fact that Section 11-151 of the Hawaii Revised statutes states that "[i]f a contest or question requires a majority of the votes for passage, any blank, spoiled, or invalid ballot shall *not* be tallied for passage or as votes cast except that such ballots shall be counted as votes cast in a ratification of a constitutional amendment." H.R.S. § 11-151 (emphasis added). Finally, the court relied on language from the Hawaii Constitution which provides that, in a con-con election, "[i]f a majority of the ballots cast upon such a question be in the affirmative, delegates to the convention shall be chosen at the next regular election. . . . " Haw. Const. Art. XVII § 2. Based on this factual record, the court concluded that, prior to the election, the average voter could not have foreseen that blank ballots would be counted as no votes. Consequently, the court held that the Hawaii Supreme Court's post-election decision to count the blank ballots as no votes resulted in a violation of Plaintiffs' Fourteenth Amendment right to due process.

In their motion for reconsideration, Defendants do not dispute the fact that prior election procedures, the Hawaii Revised Statutes, advice from the State's election office, and the Hawaii Constitution led the average voter to believe that blank ballots would not be counted in the con-con election.[1] Instead, Defendants solely focus on the

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[1] Indeed even the Attorney General of the State of Hawaii took the unequivocal position that blank ballots should not be counted for any purpose in an election. *See* Attorney General Opinion, no. 88-5.

fact that only a few of the voters saw the Fact Sheet prepared by the Office of Elections which informed voters that blank ballots would not be counted in the election. Even if the court were to consider this new evidence, and accept it as true, this would not change the court's opinion that, prior to the Hawaii Supreme Court's post-election decision, the average voter had no way of predicting that a blank ballot would be counted as a no vote. In fact, the information available to voters prior to the election suggested that a blank vote would not be counted at all. Therefore, by retroactively counting blank ballots as no votes, Plaintiffs' Fourteenth Amendment rights to due process were violated in the most serious way – by denying Plaintiffs the right to know in advance how their votes would be counted – their right to a fair election was lost.

Under the Fourteenth Amendment, voters are guaranteed the right to know, in advance, the impact of their vote. *See Jones v. Bates*, No. 97-15914, 1997 WL 629803 (9th Cir. October 7, 1997). In the *Jones* decision, the Ninth Circuit invalidated the legislative-term-limits provision of Proposition 140. The court based its decision on the fact that:

> ballot materials failed adequately to advise the voters of [Proposition 140's] principal and most drastic effect. The people were required to vote on an initiative measure without adequate notice of the severity of the burden it imposed on their fundamental voting rights – a measure that did not clearly inform them that they were being asked to adopt a lifetime ban on future legislative service by the persons they choose to be their representatives. Moreover, it is likely

> that the number of voters who were riot aware of the initiative's principal effect was sufficiently large that it could have affected the outcome of the election. We conclude that under these circumstances, even if a majority of the voters of the state of California may, under other circumstances, lawfully decide to adopt lifetime legislative term limits, the passage at Proposition 140 did not Constitutionally achieve that objective.

Id. at *12.

In the *Jones* decision, the court focused on the process by which the voters were informed of their voting rights. As the court explained, "we carefully scrutinize the process by which initiatives, such as Proposition 140 . . . are enacted. We must do so in order to ensure that sufficient notice has been given that fundamental rights will be so burdened. Simply put, we believe that the careful scrutiny required by *Burdick* must apply to the process as well as the effect of such laws." *Id.* at *13. "Furthermore, when fundamental, constitutional rights, such as voting rights, are at stake, basic tenets of procedural due process require states to adopt minimally burdensome safeguards if there is a significant risk of an erroneous deprivation of that right." *Id.* as *17.[2]

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[2] The court recognizes that the *Jones* case is in the process of en banc review. However, regardless of the outcome of that review, the principles stated in *Jones*, with regard to a voter's fundamental right to be informed of the effect of his or her vote *before* an election, are well-established.

As the *Jones* opinion suggests, voters must be adequately informed of their voting rights prior to any election. In this case, the average voter had no way of knowing, prior to the con-con election, that blank ballots would be counted as no votes. Consequently, by counting the blank ballots as no votes, Plaintiffs were denied due process under the Fourteenth Amendment. The court therefore concludes that its prior decision granting Plaintiffs' Motion for Summary Judgment was not in clear error. Accordingly, the court denies Defendants' Motion for Reconsideration.

CONCLUSION

For the reasons stated above, the court DENIES Defendants' Motion for Reconsideration.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, Nov. 18, 1997.

/s/ David A. Ezra
DAVID ALAN EZRA
UNITED STATES
DISTRICT JUDGE

Mark J. Bennett, et al. vs. Dwayne D. Yoshina, et al., Civil No. 97-00322 DAE; ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION

APPENDIX J

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, LET THE PEOPLE DECIDE, CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves and others similarly situated, and JERRY BECK, Plaintiffs-Appellees and Cross-Appellants, v. DWAYNE D. YOSHINA, Chief, Elections Officer of the State of Hawaii, Office of Elections, MAZIE K. HIRONO, Lieutenant Governor of the State of Hawaii and BENJAMIN J. CAYETANO, Governor of the State of Hawaii, in their official capacities, Defendants-Appellants and Cross-Appellees.	Nos. 97-16408 97-16543 DC No. CV 97-322 DAE **ORDER**

(Filed Jun 2, 1998)

Before: WIGGINS, NOONAN and TASHIMA, Circuit Judges.

The motion of plaintiffs-appellees and cross-appellants to stay consideration of plaintiff-appellee/cross-appellants' petition for rehearing and suggestion of the appropriateness of rehearing en banc is **DENIED.**

APPENDIX K

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 97-16408
CT/AG#: CV-97-00322-DAE

MARK J. BENNETT, CHARLES S. FRUMIN; BOBBIE CARINIO; MARK R. SPENGLER; LET THE PEOPLE DECIDE; CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves and others similarly situated, and JERRY BECK

Plaintiffs - Appellees

v.

DWAYNE D. YOSHINA, Chief, Elections Officer of the State of Hawaii; Office of Elections; MAZIE K. HIRONO, Lieutenant Governor of the State of Hawaii and BENJAMIN J. CAYETANO, Governor of the State of Hawaii, in their official capacities

Defendants - Appellants

NO. 97-16540
CT/AG#: CV-97-00322-DAE

MARK J. BENNETT, AUSA; CHARLES S. FRUMIN; BOBBIE CARINIO; MARK R. SPENGLER; LET THE PEOPLE DECIDE; CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves and others similarly situated, and; JERRY BECK

Plaintiffs - Appellees

v.

DWAYNE D. YOSHINA, Chief, Elections Officer of the State of Hawaii; Office of Elections; MAZIE K. HIRONO, Lieutenant Governor of the State of Hawaii, in their individual capacities; OFFICE OF ELECTIONS; BENJAMIN J. CAYETANO, Governor of the State of Hawaii

Defendant

and

HAWAII STATE AFL-CIO; GARY W. RODRIGUES; RUSSELL OKATA; KEITH AHUE; JACKIE FERGUSON-MIYAMOTO; DONALD ABDUL; NILDA CHOCK; CLAYTON DELA CRUZ; GUY FUJIMURA; CARMELA GOMEZ; LEONARD HOSHIJO; JONATHAN KANE; MARK MATSUMOTO; STUART MCKINLEY; RICHARD RUTT; LAWRENCE SAKAMOTO; HOWARD TASAKA; PETER TRASK; ADALINE UHRLE; GEORGE YASUMOTO; MICHAEL AMII; DENNIS CHANG; PATRICIA A. CHOW; GAREN R. DEWEESE; LESLIE ANNE DEWEESE; JAN DOI; ROBERT DOI; MELVIN FONG; KIMBERLY HAINES; WILLIAM HOSHIJO; MARSHA R. JOYNER; CALVIN KOSEKI; LEIMALAMA LEE LOI; ROBERT MATSUNAKA; LAVERNE MOORE; JANETTE M. NAGAO; ROBERT H. NAGAO; CRAIG NAHM; AYAKO NAKANISHI; DOUGLASS PANG; LARRY SAKODA; ETHEL SHINTAKU; ANDREI SOTO; GEORGE THOMAS; LEILANI THOMAS; LINDA N. THOMAS; JEANINE TSUCHIYA; MAUREEN WAKUZAWA; HARRY WOODD; LANA YOUNG

Defendant-Intervenors - Appellants

REPUBLICAN PARTY OF HAWAII

Amicus

NO. 97-16543
CT/AG#: CV-97-00322-DAE

MARK J. BENNETT, AUSA; CHARLES S. FRUMIN; BOBBIE CARINIO; MARK R. SPENGLER; LET THE PEOPLE DECIDE; CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves and others similarly situated, and; JERRY BECK

Plaintiffs - Appellants

v.

DWAYNE D. YOSHINA, Chief, Elections Officer of the State of Hawaii; Office of Elections; MAZIE K. HIRONO, Lieutenant Governor of the State of Hawaii and; BENJAMIN J. CAYETANO, Governor of the State of Hawaii, in their official capacities; OFFICE OF ELECTIONS;

Defendants - Appellees

and

HAWAII STATE AFL-CIO; GARY W. RODRIGUES; RUSSELL OKATA; KEITH AHUE; JACKIE FERGUSON-MIYAMOTO; DONALD ABDUL; NILDA CHOCK; CLAYTON DELA CRUZ; GUY FUJIMURA; CARMELA GOMEZ; LEONARD HOSHIJO; JONATHAN KANE; MARK MATSUMOTO; STUART MCKINLEY; RICHARD RUTT; LAWRENCE SAKAMOTO; HOWARD TASAKA; PETER TRASK; ADALINE UHRLE; GEORGE YASUMOTO; MICHAEL AMII; DENNIS CHANG; PATRICIA A. CHOW; GAREN R. DEWEESE; LESLIE ANNE DEWEESE; JAN DOI; ROBERT DOI; MELVIN FONG; KIMBERLY HAINES; WILLIAM HOSHIJO; MARSHA R. JOYNER; CALVIN KOSEKI; LEIMALAMA LEE LOI; ROBERT MATSUNAKA; LAVERNE MOORE; JANETTE M. NAGAO; ROBERT H. NAGAO; CRAIG NAHM; AYAKO NAKANISHI; DOUGLASS PANG; LARRY SAKODA; ETHEL SHINTAKU; ANDREI SOTO; GEORGE THOMAS; LEILANI THOMAS; LINDA N.

THOMAS; JEANINE TSUCHIYA; MAUREEN WAKUZAWA; HARRY WOODD; LANA YOUNG
Defendant-Intervenors - Appellees

NO. 97-16956
CT/AG#: CV-97-00322-DAE

MARK J. BENNETT, Esq.; CHARLES S. FRUMIN; BOBBIE CARINIO; MARK R. SPENGLER; LET THE PEOPLE DECIDE; CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves and others similarly situated, and; JERRY BECK

Plaintiffs - Appellees

v.

DWAYNE D. YOSHINA, Chief, Elections Officer of the State of Hawaii; Office of Elections; MAZIE K. HIRONO, Lieutenant Governor of the State of Hawaii and; BENJAMIN J. CAYETANO, Governor of the State of Hawaii, in their official capacities; OFFICE OF ELECTIONS

Defendants

and

HAWAII STATE AFL-CIO; GARY W. RODRIGUES; RUSSELL OKATA; KEITH AHUE; JACKIE FERGUSON-MIYAMOTO; DONALD ABDUL; NILDA CHOCK; CLAYTON DELA CRUZ; GUY FUJIMURA; CARMELA GOMEZ; LEONARD HOSHIJO; JONATHAN KANE; MARK MATSUMOTO; STUART MCKINLEY; RICHARD RUTT; LAWRENCE SAKAMOTO; HOWARD TASAKA; PETER TRASK; ADALINE UHRLE; GEORGE YASUMOTO; MICHAEL AMII; DENNIS CHANG; PATRICIA A. CHOW; GAREN R. DEWEESE; LESLIE ANNE DEWEESE; JAN DOI; ROBERT DOI; MELVIN FONG; KIMBERLY HAINES; WILLIAM HOSHIJO;

MARSHA R. JOYNER; CALVIN KOSEKI; LEIMALAMA LEE LOI; ROBERT MATSUNAKA; LAVERNE MOORE; JANETTE M. NAGAO; ROBERT H. NAGAO; CRAIG NAHM; AYAKO NAKANISHI; DOUGLASS PANG; LARRY SAKODA; ETHEL SHINTAKU; ANDREI SOTO; GEORGE THOMAS; LEILANI THOMAS; LINDA N. THOMAS; JEANINE TSUCHIYA; MAUREEN WAKUZAWA; HARRY WOODD; LANA YOUNG

Defendant-Intervenors - Appellants

REPUBLICAN PARTY OF HAWAII

Amicus

APPEAL FROM the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu)

and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED AND REMANDED IN PART, VACATED IN PART, AND DISMISSED IN PART.

Filed and entered March 27, 1998

amended June 23, 1998

Costs taxed.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARK J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, JERRY BECK, LET THE PEOPLE DECIDE, AND CITIZENS FOR A CONSTITUTIONAL CONVENTION, ON BEHALF OF THEMSELVES, AND OTHERS SIMILARLY SITUATED, Plaintiffs, vs. DWAYNE D. YOSHINA, CHIEF ELECTION OFFICER OF THE STATE OF HAWAII; OFFICE OF ELECTIONS, STATE OF HAWAII; MAZIE K. HIRONO, LIEUTENANT GOVERNOR OF THE STATE OF HAWAII; IN THEIR OFFICIAL CAPACITIES, Defendants.	CV. NO. 97-00322 DAE

(Jul 24, 1998)

ORDER DISMISSING WITHOUT PREJUDICE PLAINTIFFS' MOTIONS FOR ATTORNEYS' FEES, TO VACATE TAXATION OF COSTS AGAINST PLAINTIFFS, AND TO VACATE JUDGMENT IN PART AND TO DISMISS IN PART AS MOOT

Pursuant to Local Rule 7.2(d), the court finds this matter suitable for disposition without a hearing. After

reviewing Plaintiffs' motions and the supporting memoranda, the court DISMISSES WITHOUT PREJUDICE Plaintiffs' Motions for Attorneys' Fees, to Vacate Taxation of Costs Against Plaintiffs, and to Vacate Judgment in Part and to Dismiss in Part as Moot. Plaintiffs' motions are premature at this time. However, the court will consider Plaintiffs' motions if, and when, they become ripe for review.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, Jul 24, 1998.

/s/ David A. Ezra
DAVID ALAN EZRA
UNITED STATES
DISTRICT JUDGE

APPENDIX M

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

September 11, 1998

Mr. Steven Scott Michaels
Debevoise & Plimpton
875 Third Avenue
New York, NY 10022

Re: Citizens for a Constitutional Convention, et al. v. Dwayne D. Yoshina, Chief Election Officer of the State of Hawaii, et al. v. Dwayne D. Yoshina, Chief Election Officer of the State of Hawaii, et al.
Application No. A-214

Dear Mr. Michaels:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on September 11, 1998, extended the time to and including October 21, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Melissa A. Blalock
Melissa A. Blalock
Assistant Clerk

APPENDIX N

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARK J. BENNETT; CHARLES S. FRUMIN; BOBBY CARINIO; MARK R. SPENGLER; LET THE PEOPLE DECIDE; CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves and others similarly situated, and JERRY BECK, *Plaintiffs-Appellees,* v. DWAYNE D. YOSHINA, Chief, Elections Officer of the State of Hawaii; Office of Elections; MAZIE K. HIRONO, Lieutenant Governor of the State of Hawaii, and; BENJAMIN J. CAYETANO, Governor of the State of Hawaii, in their official capacities, *Defendants-Appellants.*	No. 97-16408 D.C. No. CV 97-0322 DAE

MARK J. BENNETT, AUSA; CHARLES S. FRUMIN; BOBBY CARINIO; MARK R. SPENGLER; LET THE PEOPLE DECIDE; CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves and others similarly situated, and JERRY BECK, *Plaintiffs-Appellants,* v. DWAYNE D. YOSHINA, Chief, Elections Officer of the State of	No. 97-16543 D.C. No. CV 97-0322 DAE

Hawaii; Office of Elections; MAZIE K. HIRONO, Lieutenant Governor of the State of Hawaii, and; BENJAMIN J. CAYETANO, Governor of the State of Hawaii,

Defendants-Appellees.

and

HAWAII STATE AFL-CIO; GARY W. RODRIGUES; RUSSELL OKATA; KEITH AHUE; JACKIE FERGUSON-MIYAMOTO; DONALD ABDUL; NILDA CHOCK; CLAYTON DELA CRUZ; GUY FUJIMURA; CARMELA GOMEZ; LEONARD HOSHIJO; JONATHAN KANE; MARK MATSUMOTO; STUART MCKINLEY; RICHARD RUTT; LAWRENCE SAKAMOTO; HOWARD TASAKA; PETER TRASK; ADALINE UHRLE; GEORGE YASUMOTO; MICHAEL AMII; DENNIS CHANG; PATRICIA A. CHOW; GAREN R. DEWEESE; LESLIE ANNE DEWEESE; JAN DOI; ROBERT DOI; MELVIN FONG; KIMBERLY HAINES; WILLIAM HOSHIJO; MARSHA R. JOYNER; CALVIN KOSEKI; LEIMALAMA LEE LOI; ROBERT MATSUNAKA; LAVERNE MOORE; JANETTE M. NAGAO; ROBERT H. NAGAO; CRAIG NAHM; AYAKO NAKANISHI; DOUGLASS PANG; LARRY SAKOKA; ETHEL SHINTAKU; ANDREI SOTO; GEORGE THOMAS; LEILANI THOMAS; LINDA N. THOMAS; JEANINE TSUCHIYA; MAUREEN WAKUZAWA; HARRY WOOD; LANA YOUNG,

Defendants-Intervenors-Appellees.

MARK J. BENNETT, AUSA; CHARLES S. FRUMIN; BOBBY CAPINIO; MARK R. SPENGLER; LET THE PEOPLE DECIDE; CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves and others similarly situated, and JERRY BECK,

Plaintiffs-Appellees,

v.

DWAYNE D. YOSHINA, Chief, Elections Officer of the State of Hawaii; Office of Elections; MAZIE K. HIRONO, Lieutenant Governor of the State of Hawaii, in their individual capacities; OFFICE OF ELECTIONS; and; BENJAMIN J. CAYETANO, Governor of the State of Hawaii,

Defendants,

and

HAWAII STATE AFL-CIO; GARY W. RODRIGUES; RUSSELL OKATA; KEITH AHUE; JACKIE FERGUSON-MIYAMOTO; DONALD ABDUL; NILDA CHOCK; CLAYTON DELA CRUZ; GUY FUJIMURA; CARMELA GOMEZ; LEONARD HOSHIJO; JONATHAN KANE; MARK MATSUMOTO; STUART MCKINLEY; RICHARD RUTT; LAWRENCE SAKAMOTO; HOWARD TASAKA; PETER TRASK; ADALINE UHRLE; GEORGE YASUMOTO; MICHAEL AMII; DENNIS CHANG; PATRICIA A. CHOW; GAREN R.

No. 97-16540

D.C. No.
CV 97-0322 DAE

DeWeese; Leslie Anne DeWeese; Jan Doi; Robert Doi; Melvin Fong; Kimberly Haines; William Hoshijo; Marsha R. Joyner; Calvin Koseki; Leimalama Lee Loi; Robert Matsunaka; Laverne Moore; Janette M. Nagao; Robert H. Nagao; Craig Nahm; Ayako Nakanishi; Douglass Pang; Larry Sakoka; Ethel Shintaku; Andrei Soto; George Thomas; Leilani Thomas; Linda N. Thomas; Jeanine Tsuchiya; Maureen Wakuzawa; Harry Wood; Lana Young,

Defendants-Intervenors-Appellants.

Mark J. Bennett; Charles S. Frumin; Bobby Carinio; Mark R. Spengler; Let the People Decide; Citizens for a Constitutional Convention, on behalf of themselves and others similarly situated, and Jerry Beck,

Plaintiffs-Appellees,

v.

Dwayne D. Yoshina, Chief, Elections Officer of the State of Hawaii; Office of Elections; Mazie K. Hirono, Lieutenant Governor of the State of Hawaii,

and; BENJAMIN J. CAYETANO, Governor of the State of Hawaii, in their official capacities; OFFICE OF ELECTIONS,

Defendants,

and

HAWAII STATE AFL-CIO; GARY W. RODRIGUES; RUSSELL OKATA; KEITH AHUE; JACKIE FERGUSON-MIYAMOTO; DONALD ABDUL; NILDA CHOCK; CLAYTON DELA CRUZ; GUY FUJIMURA; CARMELA GOMEZ; LEONARD HOSHIJO; JONATHAN KANE; MARK MATSUMOTO; STUART MCKINLEY; RICHARD RUTT; LAWRENCE SAKAMOTO; HOWARD TASAKA; PETER TRASK; ADALINE UHRLE; GEORGE YASUMOTO; MICHAEL AMII; DENNIS CHANG; PATRICIA A. CHOW; GAREN R. DEWEESE; LESLIE ANNE DEWEESE; JAN DOI; ROBERT DOI; MELVIN FONG; KIMBERLY HAINES; WILLIAM HOSHIJO; MARSHA R. JOYNER; CALVIN KOSEKI; LEIMALAMA LEE LOI; ROBERT MATSUNAKA; LAVERNE MOORE; JANETTE M. NAGAO; ROBERT H. NAGAO; CRAIG NAHM; AYAKO NAKANISHI; DOUGLASS PANG; LARRY SAKOKA; ETHEL SHINTAKU; ANDREI SOTO; GEORGE THOMAS; LEILANI THOMAS; LINDA N. THOMAS; JEANINE TSUCHIYA; MAUREEN WAKUZAWA; HARRY WOOD; LANA YOUNG,

Defendants-Intervenors-Appellants.

No. 97-16596

D.C. No. CV 97-0322 DAE

Appeals from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding

Argued and Submitted
January 16, 1998 – San Francisco, California

Filed March 27, 1998
Amended June 23, 1998

Before: Charles Wiggins, John T. Noonan, and
A. Wallace Tashima, Circuit Judges.

ORDER

The opinion filed March 27, 1998, is amended as follows (page references being to the slip opinion):

(1) Page 2782, last full paragraph, line 2: Delete "substantive".

(2) Page 2782, last full paragraph, lines 3-6: Amend sentence to read:

> In *Bates,* we upheld a California term limits initiative against the claim that the initiative "did not provide California voters with sufficient notice that the Proposition imposed lifetime limits" on officeholders,

(3) Page 2782, lines 1-7 from bottom: These two sentences are amended to read:

> In *Bates,* the court dealt with whether voters had adequate notice of the substantive content of what they were voting on. The lack-of-notice argument asserted that federal courts could strike down voter initiatives whenever the voters did not receive sufficient notice to understand what they were voting for or against.

(4) Page 2783, line 1: Delete "substantive".

(5) Page 2783, lines 4-5: This phrase is amended to read: "not that the state must inform them of the substance of what they are voting on, or anything else."

With these amendments, the panel as constituted above has voted to deny the petition for rehearing. Judge Tashima has voted to reject the suggestion for rehearing en banc, and Judges Wiggins and Noonan so recommend.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MARK J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, LET THE PEOPLE DECIDE, AND CITIZENS FOR A CONSTITUTIONAL CONVENTION, ON BEHALF OF THEMSELVES, AND OTHERS SIMILARLY SITUATED, Plaintiffs, vs. DWAYNE D. YOSHINA, CHIEF ELECTIONS OFFICER OF THE STATE OF HAWAII, AND MAZIE K. HIRONO, LIEUTENANT GOVERNOR OF THE STATE OF HAWAII, IN THEIR OFFICIAL CAPACITIES, Defendants.	CIVIL NO. 97-00332 DAE

DEPOSITION OF DWAYNE D. YOSHINA

Taken on behalf of the Plaintiffs, pursuant to Notice, on Wednesday, April 23, 1997, commencing at 9:40 a.m., at the office of McCorriston Miho Miller Mukai, Five Waterfront Plaza, Suite 400, 500 Ala Moana Boulevard, Honolulu, Hawaii 96813.

[p. 2] APPEARANCES:

For Plaintiffs:

MARK J. BENNETT, ESQ.
McCorristan Miho Miller Mukai
Five Waterfront Plaza
Suite 400
500 Ala Moana Boulevard
Honolulu, Hawaii 96813
(808) 529-7300

For Defendants:

JOHN F. DELLERA, ESQ.
Deputy Attorney General
428 Queen Street
Honolulu, Hawaii 96813
(808) 586-1255

ALSO PRESENT: Laura Shimada

REPORTED BY:

Marjana Shawler, RPR, CSR 182
Notary Public, State of Hawaii

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[p. 4] (Pursuant to Rule 14 of the Rules Governing Court Reporting in Hawaii, the reporter's disclosure was made and is attached hereto.)

DWAYNE D. YOSHINA

having been called as a witness and being first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. BENNETT:

Q. Could you state your full name, please.

A. Dwayne Yoshina.

Q. And what is your position, Mr. Yoshina, with the State of Hawaii?

A. I'm the chief elections officer.

Q. And how long have you been chief elections officer?

A. Since February of 1996.

Q. And were you Hawaii's first chief elections officer other than the lieutenant governor?

A. First appointed chief election officer.

Q. Prior to that time, the lieutenant governor was the chief elections officer?

A. Yes. Yes.

[p. 5] Q. Prior to testifying today, you received a copy of a Notice of Taking Deposition pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure?

A. Yes.

MR. BENNETT: I'm going to mark this as Exhibit 1.

(Marked for identification
Exhibit No. 1.)

BY MR. BENNETT: If you can take a look at Exhibit 1, Mr. Yoshina, this is the deposition notice that you reviewed prior to the deposition?

A. Right.

Q. And you are testifying as the Rule 30(b)(6) witness on behalf of the State of Hawaii Office of Elections?

A. Yes.

Q. Can you tell me – before we go into your work in elections, I would like to just briefly go over your education.

Can you tell me what your education is starting with high school, please.

A. You mean where I went to high school or what –

Q. Let's start with: Where did you go to [p. 6] high school and when did you graduate?

A. I graduated in 1961, Konawaena High School.

Q. And do you have any post-secondary education?

A. Yes.

Q. Can you tell me what that is?

A. I've attended University of Hawaii, both Hilo campus and Manoa.

I went to DeAnza College, which is an junior college in California; Cal State University at Hayward, received a bachelor's degree there.

I also received a master's degree in public administration from Cal State, Hayward.

I did postgraduate work in urban regional planning at the University of Hawaii, course work only, did not get a degree.

Q. When did you get your degree from Hayward?

A. I believe it was 1972.

Q. And when did you first begin working for the State of Hawaii?

A. In elections or –

Q. Let's just start with the State in general.

[p. 7] A. I think it was in October of 1981.

Q. Is that when you also began working in the area of elections?

A. Yeah – excuse me.

I worked in 1979 with the Department of Business Economic Development. At that time I think it was called Department of Planning Economic Development.

Q. And what was your initial job with the elections office?

A. Voter registration coordinator.

Q. And how long did you hold that position for, about?

A. Until December of 1982.

Q. And did you move into another elections position at that time?

A. Yeah. With the new administration, I was asked to serve as an election systems planner.

Q. And what did you do as an election systems planner?

A. I basically did planning for the Elections Division.

Q. And what does that mean?

A. That means that primarily I was to look at the operations of the Elections Division and try [p. 8] to make the operations more efficient and effective.

Q. How long did you hold that position for?

A. Until the end of that particular administration. I forget. 1986, I believe.

Q. Did you take a new position starting in the end of 1986, beginning of 1987?

A. Yeah.

Q. What was that?

A. I was appointed by the Cayetano administration to serve as deputy executive officer in the Elections Division.

Q. And that was when Mr. Cayetano was the governor?

A. Yes.

Q. And what were your job duties in that position?

A. I basically oversaw the day-to-day operations of the elections office.

Q. And was there anyone above you in the office who was an appointed officer at that time?

A. No. There was a civil service guy, and he was the director of elections.

Q. What would your day-to-day duties consist of in that position?

[p. 9] A. I oversaw the operations of the office.

Q. And how long did you hold that position for?

A. Until 1995.

Q. And that's when you became chief elections officer?

A. Yes, 1995, Excuse me.

Q. And that's when you became chief elections officer?

A. Well, I was appointed 1996, February of 1996.

Q. So in 1995 did you take a different interim position?

A. Well, I was carried over to keep track of Elections Division, and then there was a period of time of where there was an appointment process. So the the governor at that time asked me to just stay on to do the transition.

Q. And then you were appointed chief elections officer?

A. Right.

Q. What are your duties generally as chief elections officer?

A. Well, provide election services to the citizens of the state of Hawaii, to do planning as [p. 10] it relates to that, to oversee implementation, to do liaison work with the county clerks because we do work with them, to carry out legislative initiatives, basically to administer all the election laws.

Q. And is it also correct that under the statute that you are responsible for public education with respect to voter registration and information?

A. Yeah.

Q. And is it also correct that your office is also responsible for public education as to ballot issues?

A. We don't have sole responsibility for that.

During the 1996 legislative session, I believe the LRB provides us with a digest of the pros and cons for all the amendments, and so we take that and we translate that information and make it available to the public.

Q. Regardless of where you get the information from, you are the office that's charged with disseminating it?

A. Yeah.

Q. Prior to the 1996 general election, was [p. 11] your office – or did your office try to provide the voters with information as to how to calculate a majority on the constitutional convention question issue?

A. I think we provided a pamphlet of information to the media and basically – with hopes that the media would then inform the public about that.

We also created an internet web page for the first time in 1996. And during the course of 1996, we added pages as the Fact Sheets became available. So we put them on as we developed them.

Q. When you talk about the pamphlet you gave the media, was that called the Fact Sheet, or was that something else?

A. It is basically a media information packet, and within that packet there are all manner of Fact Sheets, Election Fact Sheets, that we provide them.

MR. BENNETT: Let's mark as Exhibit 2 a document entitled: Fact Sheet, Calculating A Majority On The Question On A Constitutional Convention.

Do you have that in front of you?

A. Yes.

[p. 12] (Marked for identification Exhibit No. 2.)

Q. BY MR. BENNETT: What I've marked as Exhibit 2, is that what was provided to the media in the media information packet, or was it in some other form?

MS. SHIMADA: I don't know if that was included.

A. I'm not certain if this particular thing was because the date on this is November 1st sheet, and the packet was handed out to the media prior to that.

Q. BY MR. BENNETT: Was the media given, if not this form, some other form on calculating a majority –

A. Substantially the facts are here that we provided the media.

Q. So with regard to Exhibit 2, what you provided the media was the same information in written form even if it might have been slightly – looked slightly different than Exhibit 2?

A. I really want to go back to check to see if that's part of the packet, and I'll provide you the packet to make sure what was in there.

Okay?

[p. 13] Q. You don't have the packet with you?

A. I don't have that packet with me. I didn't know that it was necessary to bring that.

Q. Is it your belief that this was provided?

A. It is my belief that it was part of that packet.

Q. And your hope was that the media would disseminate that information to the voters?

A. That's correct, because we had very little – we had little or no moneys for a public education budget.

Q. And which media did you hand this out to?

A. We sent that packet out to – a statewide distribution to all the print media and the electronic media.

Q. So when you say the "print media," all of the state or county newspapers?

A. All the dailies in the state.

Q. And the "electronic," TV and radio?

A. TV and radio.

Q. with regard to Exhibit 2, that was a Fact Sheet that was passed out to whom?

A. This was a Fact Sheet that was created on November 1st, or thereabouts, 1996.

It was for public distribution, [p. 14] basically.

Q. So your office distributed it to the public?

A. Yes. That's the intent of any Fact Sheet that we produce.

MR. BENNETT: I'll mark this as Exhibit 3.

(Marked for identification
Exhibit No. 3.)

Q. BY MR. BENNETT: Can you tell me what Exhibit 3 is?

A. This is Office of Elections web page on internet.

Q. And that also contains a discussion of how to calculate a majority on the Con Con question?

A. Yeah.

Q. I don't want to put words in your mouth, but it appears as if what both Exhibit 2 and Exhibit 3 said is that, in determining a majority, blank votes or blank ballots would not count and to determine whether the question passed you would add the yes and no votes

together, and if the yeses were one-half of the total of the yeses and nos plus one, then the question passed; is that [p. 15] correct?

A. Yeah.

Q. How did you determine that that was – prior to the elections, how did you determine that that was the method of calculating and determining whether the Con Con question passed?

A. I think we looked at the constitution and the constitution indicates that, and then we also took some direction from Section 11-151(3), sort of as guide, because basically the constitution tells us, but 151 also helps us in that sense because it says you don't count the blanks in questions or for candidates except in the case of a constitutional amendment.

So given those two things together, you kind of come to the conclusion that we shouldn't count blanks.

Q. Was it your understanding prior to the election that blank ballots had never been counted in determining whether Con Con questions put on the ballot in the past had received an affirmative majority?

A. Yeah. To my knowledge, we had not counted the blank ballots prior to that.

Q. So, to your knowledge, the blank ballots [p. 16] had not been counted in 1978, correct?

A. Uh-huh.

Q. You have to say yes or no.

A. Yes.

Q. And, to your knowledge and your office's knowledge, the blank ballots had not been counted in 1968 either?

A. That, I don't know.

1976, I think.

Q. Okay. Was it 1986?

A. And 1986.

Q. Okay. Let me go back.

To your knowledge and your office's knowledge, the blank ballots had not been counted on the Con Con question in 1986 when it was on the ballot?

A. 1986, yes.

Q. And what about when it was on the ballot in 1976?

A. Yes.

Q. They had not been counted?

A. That's right.

Q. And what about when it was on the ballot in 1966?

A. I don't know.

[p. 17] Q. So you knew they hadn't been counted in the past two elections in determining a majority, correct?

A. Yeah.

Q. And you believed that it was the historical practice of your office and the Office of the Lieutenant Governor that in determining whether the Con Con question

received a majority, blank ballots did not count in as ballots cast?

A. Yes.

Q. You agree with my statement?

A. Yes, if I'm not confused.

Q. I don't think you are, but since you said that, let me go through it again.

A. I agree.

Q. You were joking?

A. Yes.

Q. All right.

In your office's materials, was there anything that indicated that on any previous Con Con questions blank ballots had ever been counted before?

A. Not to my knowledge, no.

Q. Was there anyone – did you think that it was – when your office prepared the Fact Sheet and [p. 18] the internet site, did you believe it was really no question at all, it was clear?

A. Yes, it was clear.

Q. And that was based on the language of the constitution, the language of the statute, and past historical practice of your office?

A. To my knowledge, that's what I based it on, yeah.

Q. Was there anyone in your office or anywhere else who said: No. Dwayne, you may be wrong; maybe we have to count blank ballots?

A. No.

Q. Were you aware, prior to the election, of the supreme court's decision on the Honolulu County Charter in the Waihee case regarding the recall election?

A. I was aware of that, but I didn't think it applied in this case because it was a – well, I just didn't think it applied.

Q. Is it correct that your office learned maybe a week to ten days or so prior to the election there was a group called Citizens For a Constitutional Convention which was telling people that blank ballots would count essentially as "no" votes in determining whether there was a majority [p. 19] on the question?

A. This is that group on Kauai?

Q. Yes.

A. I learned – I'm not certain how I learned that. It may have been the deputy clerk on Kauai calling me, or I may have read an article in the Kauai – the Garden Aisle or Kauai Times. I forget which, but I became aware of that. So I was aware of it. I became aware of it.

Q. It was your position and your office's position that this group was disseminating to the voters incorrect information as to how the majority would be calculated?

A. Right. So I think there was contact made with the group, and I know that I earlier said that I believe we sent a letter out to them.

And we went back to our office to look for that letter, and we have not been able to find that letter.

I have since found out that there was telephone contact made with some woman who was part of that group, and she was told that it was incorrect information.

Subsequent to that, there was a fax of this Fact Sheet that was sent to them. I don't [p. 20] know which specific Fact Sheet, but there was some fax of a Fact Sheet sent out. I'm trying to get a copy of the record of that fax, but I have been unable to find that.

Q. The woman with the group was called by your office?

A. I'm not certain if we called her or she called us, but there was telephone contact made.

Q. And she was told that the group was disseminating incorrect information?

A. Yes.

Q. And she was told that blank votes would not count in determining a majority?

A. That's right.

Q. And she was told that she should stop telling voters that they would?

A. Well, that part I'm not sure because I did not speak to this person directly, but basically she was told that that was incorrect information.

Q. Your office obviously wants to discourage people from giving out incorrect information?

A. Oh, yes, that's true.

Q. So it would not – if she came in and gave an affidavit and said the elections office [p. 21] told me to stop giving people this information because it was incorrect, that would be consistent with your office's policy, correct?

A. She would probably be told not to disseminate incorrect information. That's what should be done.

Q. Would you agree with me that it is very important, to have a fundamentally fair election, for citizens to know upon what they are voting and for them to know what their votes mean?

A. Yes.

Q. Would you agree with me that it would have been impossible for voters to have known prior to the election that their blank ballots would count as ballots cast in determining whether or not there was a majority in favor of the Con Con question?

A. Could you repeat that?

Q. Yes.

Would you agree that it would have been impossible for voters to have known prior to the election that their blank ballots would count as ballots cast in determining whether or not there was a majority in favor of the Con Con question?

A. I think the answer to that is yes,

[p. 22] because the information we provided was that blanks would not count.

Q. Do you agree with me that it is fundamentally unfair to count the blank Con Con ballots as ballots cast when the voters were specifically told that the blank ballots would not count as ballots cast?

A. Fundamentally unfair?

Well, I think we should count the ballots in the manner in which we tell the public that we are going to count the ballots. I'm not certain if it is fundamentally unfair. It probably is unfair.

Q. So you would agree – I'll take out the word "fundamentally."

You would agree it is unfair to count the blank Con Con ballots as ballots cast when the voters were specifically told that the blank ballots would not count as ballots cast?

A. When the information we disseminated was that we would not count blanks.

Q. So then you agree with my statement?

A. Yeah.

Q. Yes?

A. Yes.

Q. And I take it that if you had known that [p. 23] blank ballots would count as ballots cast, you would have told the voters?

A. Of course.

Q. I know you've talked about in your office what you discussed prior to the election.

With regard to the position on blank ballots not counting as ballots cast, are you aware of any contrary position taken before the election by any state official?

A. Well, this group on Kauai indicated, I guess, that they had been given wrong information, that they had been told by someone in our office that the blank ballots would be counted as "no" ballots, and that's why they disseminated the information they did.

When we learned of that, we immediately tried to correct that.

But beyond that, I don't think anyone else did.

Q. And you were never able to confirm that anyone in your office had actually told this group that blank ballots would count?

A. Well, you know, the group identified a person in my office, and I talked to that person. She then followed up on that question. This person [p. 24] is now working over at the legislature. So I haven't checked with her. She no longer works with us.

Q. You don't know what she told them?

A. I don't know.

Q. Now –

A. I would have to say that if someone in the public tells me that someone told them something, I would take that at its face.

Q. After the election, with regard to either people running for office or questions on the ballot, part of your office's job is to issue a certificate as to whether the candidate is elected or whether the proposition passes or doesn't pass, correct?

A. Right.

Q. After the election, you were ready to certify the Con Con question as having passed?

A. Yes.

Q. You sought the opinion of the Attorney General; is that right?

A. Uh-huh.

Q. Were you directed to seek the opinion of the Attorney General by anyone?

A. No.

[p. 25] Q. What caused you to seek the opinion of the Attorney General?

A. Well, because there was all kinds of questions that were arising about whether or not we would count the blank ballots. So I made a call to – I believe it was Russell Suzuki, and I asked him.

Q. But all those questions that were raised, they were all after the election; no one had raised a question before the election?

A. That is correct.

Q. And the Attorney General's opinion was consistent with your belief?

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A. Well, on the initial take, they said that they would review it.

Q. Okay.

A. Then subsequent to that, they did come out with an opinion, and it was consistent with my position.

Q. Does your office have administrative regulations, HAR's?

A. Yes, rules and regs.

Q. Do any of them deal with counting blank ballots, to your knowledge?

A. No.

[p. 26] Q. Do you know what the numbers of your regs are, what chapter?

A. Fifty –

Q. It is not a memory test. You can look.

A. We just promulgated new ones. Hawaii Administrative Rules, Chapters 2-50, 2-51, 2-52, 2-53, 2-54.

We can send you copies if you want.

Q. Okay.

A. Okay.

Q. With regard to – other than this one report that you had of one election official telling something to people on Kauai, to your knowledge, whatever oral information your office gave out on how to calculate a majority prior to the election was consistent with your written materials?

A. Yes.

Q. You are familiar with Hawaii Revised Statutes 11-137, correct? Is that right?

A. Yes.

Q. And your interpretation of this statute – your office's interpretation is that, under this provision as written, voters are required to turn in to precinct officials all ballots for [p. 27] depositing in the ballot box whether they voted on them or not?

A. That's correct.

Or, in the case of the primary election, to discard those ballots that they do not use.

Q. But the Con Con question was on the general ballot?

A. That's correct.

Q. Your office's interpretation of the statute as it applied to the general election is that voters are required to turn in all ballots, whether voted on or not, and then they are all deposited in the ballot box?

A. Yes.

(Marked for identification Exhibit No. 4.)

Q. BY MR. BENNETT: I'm handing you what we've marked as 4. Can you take a look at it and tell me what this is?

A. This is our Precinct Official Manual. It is provided to all precinct officials at our trainings.

Q. What's a precinct official?

A. A precinct official is that person who is in the polling place on election day and who [p. 28] provides the election services of that polling place to the voter on election day.

Q. How many precinct officials, about, do you have in this state?

A. Between 3500 to 4,000.

Q. And how many of them worked during the 1996 general?

A. About that many.

Q. So 3500?

A. 3500 to 4,000. I could get you a precise number.

Q. No. That's all right.

A. Okay.

Q. Did they all get Exhibit 4?

A. The majority of them get this exhibit.

There are precinct officials that we have to recruit on election day because our regularly scheduled people don't show up. So we recruit them and on that day, and the chairs and the voter assistance officials train them on site.

Q. But other than the people who you recruit on the day of the election, everybody at least is supposed to get Exhibit 4, everybody else?

A. That's correct.

Q. Do precinct official [sic] receive training [p. 29] from your office?

A. Yes.

Q. Can you tell me what that training consists of?

A. Training consists of an hour to an hour-and-a-half block of instruction that goes over all of the procedures that are outlined in this book.

In addition to that, the chairpersons and voters assistance officials are provided additional training from these two manuals.

You have copies of this?

Q. Yes.

Let's look at Exhibit 4 for a minute. If you could turn – I'm going to go through a couple of the areas there.

If you could turn to page 7 –

A. Okay.

Q. – It talks about – and I believe it is talking here about in the general election the ballot box station.

Do you see that, step 6 on page 7?

A. Right.

Q. What is the ballot box station?

A. This is the station where the ballot box [p. 30] is located, and this is the point where a voter – this is the last station before the voter leaves the polling place.

Q. You see there under 1 it is talking about responsibilities of the precinct official at the ballot box station?

A. Right.

Q. And so am I correct that they are trained that they are supposed to: A. confirm that the voter has finished voting by asking the voter have you checked both sides of the ballot and are all your ballots in the ballot holder; B. receive the ballot holder with the voted ballots from the voter; and, C. verify that the correct number of ballots are in the ballot holder?

A. Yeah, that's what they are supposed to do.

Q. If you could turn to page 33 – actually at the bottom of 32.

A. Okay.

Q. Do you see a heading at the bottom of 32: While polls are open, standard operating procedures?

A. Right.

Q. And this is again telling the precinct [p. 31] workers what they are supposed to do during an election?

A. That's correct.

Q. And do you see on 33 – I'm going to read from E, first of all. The precinct officials are told to: Ask every voter have you checked both sides of the ballots and are all of your ballots in the ballot holder.

Correct?

A. Correct.

Q. If the voter answers "yes," they are told to take the ballot holder from the voter. If the voter answers

"no," they are taught to instruct the voter to return to the voting booth to vote and insert the ballots in the ballots holder.

Then under G, the precinct officials are taught that they are required to: Verify that the correct number of ballots are in the ballot holder by feeling the ballots through the semi-circle grip at the bottom of the ballot box?

A. Yeah. They are told that. But they are also instructed at the training sessions to do both a tactile and a visual.

When we put it in here, we just basically say you feel the ballots.

[p. 32] Q. In the oral training, you tell them feel and look?

A. Yeah, it is both a tactile and visual instruction.

Q. All right.

If you could turn to page 36 –

A. Okay.

Q. This is a copy of this exhibit that I got from you, correct?

A. Right.

Q. There is some writing on page 36, right?

A. Yes. It is a test.

Q. But some answers are circled, correct?

A. Oh, yes.

Q. And that was done by your office?

A. I believe that it was done by my office. I'm not certain.

Q. If you can take a look at, in the test, multiple choice number 2. As a ballot box official, you will: The correct answer to that is supposed to be D, all of the above, correct?

A. Correct.

Q. And so the ballot – so the officials are supposed to receive the voted ballots from each voter, insure the correct number of ballots are [p. 33] received and deposit the ballots in the ballot box?

A. That's correct.

Q. Then under the true/false, number 7, the correct answer is "true," correct?

A. Yeah.

Q. That they are supposed to ask, precinct officials: Have you checked both sides of the ballot and are all of your ballots in the ballot holder?

A. That's correct.

Q. Is it correct that voters are not told by precinct officials, either orally or in writing, that if they don't want to vote on a particular question they don't have to turn in their ballot?

Do you want me to try that one again?

A. Yes.

Q. Voters are never told that if on a particular question they don't want to vote they don't have to turn in their ballot?

A. That's correct.

Q. And the voters on the Con Con question were not told that if you don't want to vote on this just don't turn in your ballot?

A. No.

Q. Correct?

[p. 34] A. That's correct.

The voter is never told anything about voting except the mechanics of voting.

Q. But just as an example, I guess, if you were using – at some point I think you had told me in the 1970's Hawaii – and before Hawaii used voting machines?

A. That was in the 1960's.

Q. But on a voting machine, if you don't want to vote, you just don't push a particular lever, right?

A. It depends on the voting machine. The voting machines and the logic of the voting machines. I don't believe there is any voting machine that is able to count a blank vote.

So I think in a voting machine a vote is either yes or no.

Q. Okay.

Given the supreme court's ruling that blank votes turned in and put in the ballot box count as votes cast, in

this election the voters on the Con Con question had no opportunity to abstain on that question, correct?

A. Could you repeat that? I don't know if I –

[p. 35] Q. Okay.

You understand that the supreme court ruled that the blank ballots placed in the ballot box counted as ballots cast?

A. That's what the supreme court said.

Q. So in this election, then – like when you vote for president or governor or something, voters have the ability to abstain by just not voting for a particular candidate, correct?

A. That's correct.

Q. In this election on the Con Con question, voters did not – given the supreme court's ruling, voters did not have the ability to abstain on the Con Con question?

A. Given the ruling, that's correct.

Q. Do you have with you the information – strike that.

Putting aside OHA voters, non-OHA voters in this election received three paper ballots, correct, in the general?

A. Right.

MS. SHIMADA: Some counties had four.

A. Some counties had four. I think Kauai had four as Laura said.

Generally in the state, everyone received [p. 36] three ballots. An OHA voter would get four.

(Marked for identification Exhibit No. 5.)

Q. BY MR. BENNETT: Exhibit 5 is an exact copy of the ballot containing the Con Con question, correct?

A. Yes.

Q. The only difference between this and the actual ballot is both sides of the ballot are printed here on one side of the paper?

A. That's right. This is a facsimile.

Q. But with regard to the actual ballot, it would be one piece of paper about half the width of this with the three constitutional amendments on one side and the Con Con question on the other?

A. Yeah.

What you refer to as a side, we would call the face of the ballot.

Q. Okay.

A. Yeah, there are two faces to the ballot.

Q. In general, voters receive, in addition to this C ballot, an A ballot and a B ballot?

A. That's correct.

Q. On the C ballot, do you have information as to how many of the ballots were left blank on [p. 37] each of the four questions on the ballot, the three constitutional amendment questions and the Con Con question?

A. Yes, I have that somewhere. I do have that somewhere, yes.

Q. Can you go ahead and tell me?

A. Total A ballots cast is 370,230.

Total B ballots cast, 369,427.

And total C ballots cast, 369,357.

The A ballot is a candidate ballot. The B ballot was the Board of Education ballot and the county charter. The C ballot contained the constitutional amendments and the Con Con question.

On Kauai there was a D ballot, and that contained the Kauai charter amendments.

Q. On the C ballot, do you have the information as to how many were left blank on each of the three constitutional amendment questions?

MS. SHIMADA: Constitutional amendment questions, so there are three different.

A. Okay. You want the three numbers?

Q. BY MR. BENNETT: Yes.

A. For the first question which authorizes revenue bonds for hurricane relief there were [p. 38] 42,482 or 11.5 percent blank ballots.

Q. Okay.

A. In the second question having to do with school construction projects, there were 43,353 blank ballots, 11.7 percent of the votes cast.

Constitutional amendment having to do with federal financial aid, there were 82,125 or 22.2 percent blank ballots.

Q. So –

A. And the constitutional convention, there were 45,245 or 12.2 percent blank votes.

Q. So for some reason on constitutional amendment question 3, almost twice as many people did not vote on that as on the other two amendments?

A. Yes.

Q. Has it been your experience as chief elections officer that the numbers of people who choose not to vote on propositions and constitutional amendments greatly varies depending on what it is that's on the ballot?

A. Oh, yeah.

Q. With regard to the constitutional amendments, your Fact Sheets and other written materials tell the voters that if they don't vote [p. 39] on that question, that will count – the blank vote will count in determining whether the question passes?

A. Constitutional amendments?

Q. Yes.

A. I have to check that.

Yes, it does.

Q. And they are told that?

A. Well, if they ask, yeah, they are told.

Q. And the written materials you disseminate tell them that?

A. Yes.

(Marked for identification Exhibit No. 6.)

Q. BY MR. BENNETT: Is it correct that Exhibit 6 is an affidavit that you executed under oath on or about February 12th, 1997?

A. Yes – I'm not certain of the exact date, but I guess.

Q. And that's your signature, correct?

A. That's my signature.

This is for the other case, right?

Q. Yes, the supreme court case.

A. Yes. I remember this now. Yes, this is my affidavit.

[p. 40] Q. And paragraphs 5 and 6 – and take time to read them – which you swear to is true and correct on February 12th, you still believe to be true and correct today?

A. Yes.

MR. BENNETT: Why don't we take a short break. I'm almost done.

(A recess was taken.)

Q. BY MR. BENNETT: Mr. Yoshina, just so we're fair, your office has checked and they've determined that apparently the Con Con Fact Sheet was not in the media packet?

A. That's correct.

Q. But you will get me a copy of the media packet?

A. I will.

Q. Is it correct that if there were a special election ordered on the Con Con question that that would cost, I think, somewhere around a million or a million-and-a-half dollars; is that right?

A. Well, we have some figures on that. I think the numbers we have provided the legislature – oh, I have that here. Excuse me.

If it were held nonconcurrently – sorry [p. 41] to make up these words. But if it were held as an independent election, it would cost 2 million – 2,123,000.

And if it were held concurrent with a regular election, we estimated the cost to be 275,623.

If you want these figures, we can give them to you.

MR. BENNETT: Go off the record for a minute.

(A discussion was held off record.)

MR. BENNETT: I'm going to mark this as Exhibit 7.

(Marked for identification Exhibit No. 7.)

Q. BY MR. BENNETT: Mr. Yoshina, Exhibit 7 is the information on the Con Con that the voters had – that was provided to the voters in the precincts at the election?

A. Yes. This is part of a packet of information on the constitutional amendments and the Con Con question that is available to voters each polling place.

Q. And with regard to what's on this exhibit where it talks about if a majority of the ballots [p. 42] cast for this question are "yes," this was referencing a majority of the total of the yeses and the nos?

A. Yes.

Q. And if a voter asked, that's what a voter would have been told?

A. That's correct.

Q. And you don't keep track of how many voters asked?

A. No. This is just available for them. So they can pick it up and look at it.

Q. I mean on the question of the majority of the yeses and nos, you don't keep track of how many voters may have asked precinct officials about that?

A. We checked with our control center. This is a center on Oahu that we have telephone lines from all the precincts. To her recollection, the control center manager does not remember any occurrence of a question like that during the general election.

Q. Would they have been called in if there were questions?

A. Of course, yes.

MR. BENNETT: All right. I don't have [p. 43] any more questions.

MR. DELLERA: I have no questions.

MR. BENNETT: Thanks very much.

(The deposition concluded at 10:40 a.m.)

OFFICE OF ELECTIONS
State of Hawaii

DWAYNE D. YOSHINA
Chief Election Officer

FACT SHEET

CALCULATING A MAJORITY ON THE QUESTION ON A CONSTITUTIONAL CONVENTION

GENERAL INFORMATION

Pursuant to Section 2, Article XVII, Hawaii State Constitution, the legislature may submit at any general election a question asking the electorate whether or not a constitutional convention should be convened. If a nine-year period elapses during which the question has not been submitted, then the Lieutenant Governor will certify the question, to be voted on at the first general election following the expiration of the nine-year period.

The last time voters were asked whether there should be a constitutional convention was in 1986. Since a nine-year period during which the question was not submitted to the voters elapsed, the Lieutenant Governor certified the question to be placed on the 1996 General Election ballot.

QUESTION

During the 1996 General Election, voters will be asked the following question:

> "Shall there be a convention to propose a revision of or amendments to the Constitution?"

If a majority of the voters vote YES, then a constitutional convention will be held. If a majority of the voters vote NO, then a constitutional convention will not be held.

Ex: 2

Wit: Yoshina

Date: 04-23-1997 Rep: ms

CALCULATING A MAJORITY

Pursuant to Section 2, Article XVII, Hawaii State Constitution, if a majority of the ballots cast upon such a question be in the affirmative, delegates to the convention shall be chosen at the next regular election. Section 11-151(3), Hawaii Revised Statutes, states that:

> If a contest or question requires a majority of the votes for passage, any blank, spoiled, or invalid ballot shall not be tallied for passage or as votes case except that such ballots shall be counted as votes cast in ratification of a constitutional amendment.

NOTE: Majority means 50% of the votes plus one vote. In this case, a majority of the votes cast upon the question means that the "YES" votes divided by the total of the "YES" and "NO" votes must be at least 50% of the votes plus one vote.

Accordingly, to determine whether the constitutional convention will be held, more than 50% of the voters must vote YES. Spoiled, blank, and invalid ballots are not included in the calculation of a majority for this question.

Example:

"YES" votes= 231,859

"NO" votes = 102,721

Votes cast upon the question = 334,580

334,580 votes x 50% = 167,290 votes + 1 vote = 167,291 votes needed for a majority

Since 231,859 is more than the 157,291 votes needed, the question received a majority of the votes.

Elections – BOPS
November 1, 1996

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OFFICE OF ELECTIONS
State of Hawaii

DWAYNE D. YOSHINA
Chief Election Officer

1996 CONSTITUTIONAL CONVENTION QUESTION

Question	Background	Explanation of Question	Meaning of a "Yes" Vote	Meaning of a "No" Vote
CONSTITUTIONAL CONVENTION QUESTION				
"Shall there be a convention to propose a revision of or amendments to the Constitution?"	Pursuant to Section 2, Article XVII, Hawaii State Constitution, the legislature may submit at any general election a question asking the electorate whether or not a constitutional convention should be convened. If a nine-year period elapses during which the question has not been submitted, then the Lieutenant Governor will certify the question, to be voted on at the first general election following the expiration of the nine-year period.	The constitutional convention question last appeared on the ballot in the 1986 General Election. Since the nine-year period has passed, the question has been certified by the Lieutenant Governor and is to be voted on by the electorate during the 1996 General Election.	A "Yes" vote means that a constitutional convention should be convened to revise or make amendments to the State Constitution. If a majority of the ballots cast for this question are "yes," delegates to the convention will be elected during the next regular election, unless the legislature provides for the election of delegates at a special election. Any qualified voter of the district concerned will be eligible to membership in the convention. The legislature will provide for: • The number of delegates to the convention; • The areas from which they shall be elected; and • The manner in which the convention shall convene. The legislature will also provide for the necessary facilities and equipment for the convention.	A "No" vote means that a constitutional convention should not be convened.

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ENGLISH FACSIMILE BALLOT

SIDE 1

TOP

C

STATE OF HAWAII

OFFICIAL BALLOT
GENERAL ELECTION
TUESDAY, NOVEMBER 5, 1996

AMENDMENTS TO THE STATE CONSTITUTION PROPOSED BY THE EIGHTEENTH LEGISLATURE

VOTE BOTH SIDES (OVER)

This stub shall be removed by the Election Official only.

The full text of the constitutional amendments covered by this ballot is available for inspection at your polling place. Ask an Election Official for it, if you wish to see it.

1 Shall the State Constitution be amended to authorize the use of revenue bonds to finance a loan program to make loans to state property insurance programs that provide hurricane insurance coverage to the general public?

YES ➤ +

NO ➤ +

2 Shall the State be allowed to appropriate the funds of the state educational facilities improvement special fund for periods beyond three years to allow for acquisition or construction of public school facilities?

YES ➤ +

NO ➤ +

3 Should the exception that permanently prevents the lapsing of unencumbered general obligation bond funds which are deemed necessary by the legislature to qualify for federal aid financing and reimbursement be removed from the provision that requires the lapsing of all unencumbered funds at the end of each fiscal period?

YES ➤ +

NO ➤ +

501 VOTE BOTH SIDES (OVER) C

SIDE 2

STATE OF HAWAII

OFFICIAL BALLOT
GENERAL ELECTION
TUESDAY, NOVEMBER 5, 1996

PROPOSED CONSTITUTIONAL CONVENTION

VOTE BOTH SIDES (OVER)

Shall there be a convention to propose a revision of or amendments to the Constitution?

YES ➤ +

NO ➤ +

FACSIMILE

Ex. 5
Wit: Yoshina
Date: 4/23/97 Rep: AS

502 VOTE BOTH SIDES (OVER) C

APPENDIX P

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, JERRY BECK, LET THE PEOPLE DECIDE, AND CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves, and others similarly situated, Plaintiffs-Appellees, Cross-Appellants, vs. DWAYNE D. YOSHINA, Chief Election Officer of the State of Hawaii, et al., Defendants-Appellants, Cross-Appellees.	Appeal Nos. 97-16408 & 97-16543 D.C. Civ. No. 97-00332 DAE Hawaii (Honolulu)

(Filed Jul. 07, 1998)

SUGGESTION OF PARTIAL MOOTNESS AND PLAINTIFFS' MOTIONS (1) TO TRANSFER PLAINTIFFS' CLAIM FOR ATTORNEYS' FEES TO THE DISTRICT COURT, OR, IN THE ALTERNATIVE, FOR AWARD OF ATTORNEYS' FEES ON APPEAL, (2) TO RECALL THE MANDATE, AND (3) TO VACATE THE JUDGMENT AND REMAND WITH INSTRUCTIONS

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Plaintiffs-Appellees, Cross-Appellants respectfully suggest that the issue of whether there must be a new election in 1998 upon whether "there [shall] be a convention to propose a revision of or amendments to the Constitution [of Hawaii]," Haw. Const. art. XVII, § 2, is moot. The basis for this suggestion is the action of Defendant Benjamin Cayetano, in his capacity as Governor of Hawaii, in signing into law on Friday, June 26, 1998, Hawaii House Bill No. 3130. House Draft 1, Senate Draft 1 ("H.B. 3130" or "the Act of June 26, 1998"). That law, signed three days after the Plaintiffs' Petition for Rehearing was denied, and while the time in which to seek review of this Court's judgment had not expired, grants Plaintiffs the principal relief sought in this litigation – a new election on the convention question.

As explained more fully in the accompanying memorandum, as a consequence of this out-of-court victory. Plaintiffs are now "prevailing parties" under the Civil Rights Attorneys Fees Act of 1976, 42 U.S.C. § 1988. Pursuant to Ninth Circuit Rules 39-1.6 and 39-1.8, Plaintiffs now move this Court to transfer to the District Court the issues of (1) whether Plaintiffs are "prevailing parties" under § 1988; and (2) what amounts should be awarded to them as attorneys fees and costs on appeal.

In the alternative, and without waiving their right to an evidentiary hearing on their claim for fees and other costs on appeal, Plaintiffs move this Court to grant Plaintiffs' fees and cost request, or to refer such parts of the petition as appropriate to the Appellate Commissioner under Rule 39-1.9 for decision or recommendation.

To the extent necessary to accomplish either of the foregoing, Plaintiffs also move this Court to recall the mandate under its inherent power and 28 U.S.C. § 1651, and to vacate the part of the judgment awarding Defendants their taxable costs on appeal and denying Plaintiffs their taxable costs on appeal.

Finally, to relieve the United States Supreme Court of the task of vacating this Court's judgment on the grounds of mootness, Plaintiffs independently, and particularly if the Court otherwise recalls the mandate, move the Court to recall the mandate for the purpose of vacating the judgment, to vacate the judgment in No. 97-16408, to dismiss the appeal as moot, to affirm the judgment in No. 97-16543 (the cross-appeal) for the reasons stated by the District Court, and to remand with instructions to dismiss the complaint's prayer for a new election as moot.

This motion is made pursuant to Article III of the United States Constitution, 28 U.S.C. § 1651, 42 U.S.C. § 1988, and the Court's inherent power, as well as pursuant to Fed. R. App. P. 1 and 27, Ninth Circuit Rules 39-1.6, 39-1.8, and 39-1.9, and is further based upon the attached memorandum and exhibits, and the record of proceedings in these and the related appeals.

Respectfully submitted: July 6, 1998.

McCORRISTON MIHO MILLER MUKAI
MARK J. BENNETT, ESQ.

DEBEVOISE & PLIMPTON

/s/ Steven S. Michaels
STEVEN S. MICHAELS, ESQ.
Attorneys for Plaintiffs-
Appellees, Cross-Appellants

[Caption Deleted]

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTIONS (1) TO TRANFER [sic] PLAINTIFFS' CLAIM FOR ATTORNEYS' FEES TO THE DISTRICT COURT, OR, IN THE ALTERNATIVE, FOR AWARD OF ATTORNEYS' FEES ON APPEAL, (2) TO RECALL THE MANDATE, AND (3) TO VACATE THE JUDGMENT AND REMAND WITH INSTRUCTIONS

INTRODUCTION AND SUMMARY OF ARGUMENT

On June 26, 1998, only three days after the panel denied Plaintiffs' Petition for Rehearing, Defendant Benjamin Cayetano, in his capacity as Governor of Hawaii, signed into law legislation (H.B. 3130) that gives the citizens of Hawaii this November a right that has never before existed in the history of the Fiftieth State: The right to vote upon whether to hold a constitutional convention only two years after the preceding vote on that issue. This was the relief principally at issue in these appeals. *See Bennett v. Yoshina*, Nos. 97-16408, 97-16543, 97-16540, and 97-16596, Slip Op. at 6295 (9th Cir. June 23, 1998) (as amended on denial of rehearing) ("Amended Slip Op.")[1] And, for this reason, the Governor's action largely moots this case.

The passage of HB 3130 was in material part a product of this suit and the pressure it placed upon the State

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[1] The District Court had originally ordered a new election within sixty days of its entry of summary judgment on July 10, 1997, but modified its injunction on two occasions to permit the State to hold the new election on December 8, 1997. A stay of the injunction pending appeal was granted, and, had the judgment been affirmed on appeal, it was likely that the judicially-ordered election would have occurred this November.

of Hawaii to redress the unfairness generated by the decision in *Hawaii State AFL-CIO v. Yoshina*, 935 P.2d 89 (Haw. 1997). That decision retroactively and unexpectedly counted as "ballots cast upon [the] question" of whether to hold a constitutional convention more than 45,000 "blank ballots" that had been returned by voters at the November, 1996, general election. If, at any time before the November elections, state officials indicate they will not be holding a new election on the convention question, Plaintiffs will be able to seek immediate relief in the state courts to obtain equitable orders mandating compliance with the Act of June 26, 1998. *See Bush v. Watson*, 918 P.2d 474, 1137-38 (1996) (state court suits to compel compliance with statutes not barred by sovereign immunity). These enforceable rights sharply and materially alter the legal relationship of the parties.

Before this suit was filed, no action had been taken by any state official to redress *Yoshina's* unfairness. The Attorney General of Hawaii forfeited the State's right to seek *Yoshina's* review, and, even though weeks remained in the 1997 legislative session when *Yoshina* was decided, no legislative action was initiated. Not until January 28, 1998, after the case here was briefed and argued, was HB 3130 introduced. The committee report by the Hawaii House Judiciary Committee recommending passage specifically referred to the injunction issued by the District Court as a justification for the bill. Both the House and Senate committee reports expressly or impliedly referred to the "controversy" and "confusion" unearthed in, or generated by, this lawsuit, as justifying a new plebescite. The deposition of the Chief Election Officer in this case, which would not have existed but for the litigation, was

cited by Plaintiffs' counsel to the committees in both Houses as demonstrating *Yoshina's* unfairness, and how the 1996 election was marred by confusion over the rule for counting "blank ballots." Only after he was deposed in this case and these appeals were submitted did the Chief Election officer himself testify in favor of the curative legislation.

The Governor's action here was hardly gratuitous. Plaintiffs' claims, which Judge Ezra upheld, were not " 'frivolous, unreasonable or groundless.' " *Sablan v. Department of Finance of the Northern Mariana Islands*, 856 F.2d 1317, 1325 (9th Cir. 1988). Passage of HB 3130 mooted a substantial federal controversy and spared the State the burdens – and risks – of defending *Yoshina* in the Supreme Court of the United States.

Under these circumstances, Plaintiffs are "prevailing parties" under the Civil Rights Attorneys Fees Act of 1976, 42 U.S.C. § 1988, and, at a minimum, have a sufficient claim of entitlement under that Act that they have a federally protected right under the Due Process Clause to have their claim for fees and costs litigated on their merits based on HB 3130's passage. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *Verrilli v. City of Concord*, 557 F.2d 664, 665 (9th Cir. 1977). Out of fees and disbursements of approximately $200,000 that the Plaintiffs' firms have billed to these appeals, they seek only $86,366.25 as compensation for attorney time, and disbursements of only $7411.90, plus the customary 4.16 percent Hawaii charge for general excise taxes (which charge will be rebated to the State of Hawaii when taxes on the award here are paid).

The requested fee, which pursuant to *Kentucky v. Graham*, 473 U.S. 159 (1985), will be funded by the taxpayers of Hawaii, amounts to somewhat less than ten cents per each of Hawaii's approximately one million plus current citizens.

Presently, the judgment of this Court provides that "Yoshina shall recover his costs on appeal from Bennett" and "Bennett and the AFL-CIO shall bear their own costs on appeal." *Bennett v. Yoshina*, Nos. 97-16408, 97-16543, 97-16540, and 97-Amended Slip Op. at 6305. Plaintiffs have also filed the one Petition for Rehearing allowed by Fed. R. App. P. 40, and the Court has by order denied *in toto* Plaintiffs' motion to stay consideration of the Petition for Rehearing and for leave to file an Amended Petition for Rehearing. Because § 1988 provides that attorneys' fees are awarded "as part of the costs," the issue now arises as to how, in light of the mandate (which issued automatically on June 30, 1998, under Fed. R. App. P. 41(a)), Plaintiffs' claim for fees and costs should be addressed.

Due Process and the Ninth Circuit Rules leave this Court several options. One is for the Court to do nothing, and to allow Plaintiffs to file their attorneys fees and costs petition in the District Court without express permission by this Court, on the view that the mandate does not preclude the entry of a judgment for fees and costs in favor of the Plaintiffs based on HB 3130. "[A]lthough the mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court, it 'leaves to the district court any issue not expressly or impliedly disposed of on appeal.' " *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986). The

specific claim of whether, in light of the action of the Governor on June 26, 1998, Plaintiffs are entitled to their reasonable attorneys' fees and costs, was not "expressly or impliedly disposed of on appeal" because the facts underlying that claim *did not exist* when this Court issued either its original opinion on March 27, 1998, or denied rehearing on June 23, 1998. To hold otherwise would allow the ministerial issuance of the mandate pursuant to Fed. R. App. P. 41(a) to generate an "adjudication" of claims dependent on facts that the Court not only was not aware of, but which did not exist, when the Court last reviewed the case. That result would violate *Logan*, and the Due Process Clause of the Fifth Amendment. This Court's mandates should not be interpreted to visit a denial of Due Process, and a denial of this motion accordingly should not signify that this Court has barred Plaintiffs from filing directly in the District Court.

Another option, and one that would avoid confusion and needless litigation, would be for this Court to interpret Ninth Circuit Rule 39-1.8 as empowering the panel by express written order to transfer Plaintiffs' fees and cost petition, which is timely under the Rule, for adjudication in the District Court. In addition to providing clear guidance, such a disposition (as opposed to adjudication of the fee petition in this Court) is required unless Defendants concede Plaintiffs are "prevailing parties." As this Court has long held, "[w]hether a party has shown a causal nexus between the lawsuit and the action taken is a factual determination for the *district* court." *McQuiston v. Marsh*, 707 F.2d 1082, 1085 (9th Cir. 1983) (emphasis added). *Accord Goehring v. Brophy*, 94 F.3d 1294, 1304 (9th Cir. 1996).

It is unclear whether the mandate must be recalled for a transfer order to be entered. Under Rule 41, Fed. R. App. P., the mandate automatically issues seven days after the denial of a petition for rehearing, while Circuit Rules 39-1.6 through 39-1.9 contemplate that adjudication of fee petitions will not take place until at least a week *after* the mandate issues. However, if it is necessary for the mandate to be recalled to issue a transfer order, ample authority for that action lies under this Court's ruling in *Verrilli v. City of Concord*, 557 F.2d 664, 665 (9th Cir. 1977) (recalling mandate even though the entitlement to fees could have been raised in petition for rehearing, because to do otherwise would visit "an unintended unjust result in that it deprived the appellant of a lawful statutory right to invoke the discretion of the district court under the [Fees] Act.").

If, however, the Court disagrees (1) that the District Court is free to adjudicate Plaintiffs' fee and cost petition under the mandate as currently written, and (2) that it is appropriate to transfer the petition to the District Court, the Court itself must, at a minimum, adjudicate the petition on its merits. Under this option, the Court should hold directly, based on the submission herein, that Plaintiffs are "prevailing parties," and it should decide the reasonable fees and costs to be taxed against Defendants, or refer the matter of the amount to be awarded to the Appellate Commissioner. In Section IV below, Plaintiffs, based on the declarations of counsel, have set forth the hours reasonably worked, the rates claimed, and the other costs incurred, and made appropriate deductions based on the controlling case law. As in the case of a transfer, if the mandate must be recalled to permit this

Court to award fees and costs to Plaintiffs, the Court should do so pursuant to *Verrilli*.

Finally, though unnecessary to the success of the fees and cost petition, the Court should, particularly if it decides to recall the mandate for other purposes, recall the mandate in light of the mootness of the principal issue presented, vacate the panel judgment and remand to the District Court with instructions to dismiss the complaint as moot to the extent it sought the remedy of a new election. Because Plaintiffs filed the one Petition for Rehearing contemplated by Fed. R. App. P. 40, and because the Court has denied their request to file an amended petition, Plaintiffs suggest, subject to their right to seek review of this Court's denial of relief in No. 97-16543, that the disposition in their cross-appeal should be vacated, and the judgment of the District Court, to the extent that it was favorable to Defendants, be affirmed for the reasons expressed by the District Court, namely, that the remedy prayed for in No. 97-16543 is not appropriate if a new election is ordered. Under the reasoning of the panel decision, this disposition would not require any further action in the intervention appeals. These appeals would remain moot.

ARGUMENT

I. Under Controlling Precedent, the Governor's Action of June 26, 1998, in Signing HB 3130 Renders the Plaintiffs "Prevailing Parties" Under 42 U.S.C. § 1988.

Section 1988 of Title 42, U.S.C., provides that "the court, in its discretion, may allow the prevailing party,

other than the United States, a reasonable attorneys' fee as part of the costs." The discretion to deny fees to a prevailing plaintiff is narrowly subscribed, and when civil rights plaintiffs attain the status of "prevailing parties" they "should ordinarily receive attorneys' fees unless special circumstances would render an award unjust." *Sable Communications of California v. Pacific Telephone & Telegraph Co.*, 890 F.2d 184, 193 (9th Cir. 1989).

Civil rights plaintiffs are deemed to be "prevailing parties" if "they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). "*Hensley* approves a generous standard for determining when a plaintiff is a 'prevailing party.' The *extent* of the plaintiff's success is considered only in determining the amount of the award." *Lummi Indian Tribe v. Oltman*, 720 F.2d 1124, 1125 (9th Cir. 1983) (emphasis in original), *quoted, Sable Communications of California v. Pacific Tel. & Tel.*, 890 F.2d 184, 192 (9th Cir. 1989)).

As this Court has held for many years, "even in the absence of a favorable judgment, a litigant may be a prevailing party for purposes of an attorney fee award if his action was a 'catalyst' which motivated the defendant to provide the relief originally sought through litigation." *Beach v. Smith*, 743 F.2d 1303, 1306 (9th Cir. 1984). Despite *dicta* to the contrary in *Farrar v. Hobby*, 506 U.S. 103 (1992), this Ccurt has reaffirmed that a plaintiff seeking equitable relief need not obtain "an enforceable judgment against the defendant from whom fees are sought, . . . or [even] comparable relief through a consent decree or settlement," *Farrar*, 506 U.S. at 111, holding that "*Farrar*

does not preclude a catalyst test." *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995). As stated in *Stivers v. Pierce*, 71 F.3d 732 (9th Cir. 1995), even under a catalyst theory, "[t]he degree of success is irrelevant to the question whether the plaintiff is the prevailing party," and "voluntary action, such as a change in conduct that addresses the grievance, is sufficient." *Id.* at 751. *See Wilderness Society v. Babbitt*, 5 F.3d 383, 388 (9th Cir. 1993) (group's lawsuit was catalytic factor in government's decision to conduct environmental study).

In determining whether plaintiffs may obtain fees and costs under a catalyst theory, this Court has set forth "two subsidiary inquiries." *Sablan v. Department of Finance of the Northern Mariana Islands*, 856 F.2d 1317, 1325 (9th Cir. 1988):

> First, we must determine what [plaintiffs] sought to accomplish in bringing [their] lawsuit and then determine whether the lawsuit was causally linked to the relief actually obtained . . . . Second, there must be a legal basis for the [plaintiffs'] claim – it must not be "frivolous, unreasonable or groundless."

Id. (citations omitted); *see also Stivers*, 71 F.3d at 752 (reiterating the two-prong "causal link" and "legal basis" test).

There "can be no doubt" Plaintiffs have met this test. *Stivers*, 71 F.3d at 753. More important, Plaintiffs have sufficient factual support for the *claim* that they met the test for a "catalyst" recovery that the issue of fees and costs should be heard first in the District Court, even if (indeed especially if) this Court believes the causal inquiry could "go either way."

A. Plaintiffs Meet the "Causal Link" Test.

"The 'causal link' prong of this [Court's] two part 'catalyst' test for determining 'prevailing party' status is nothing more than an inquiry into factual causation." *Sablan*, 856 F.2d at 1325. And, in assessing the evidence, this Court has followed the pragmatic reasoning of the Fifth Circuit that " 'the provocative effects of the plaintiffs' legal efforts are often best gleaned from the chronology of events; defendants, on the whole, are usually rather reluctant to concede that the litigation prompted them to mend their ways.' " *Id.* at 1326 (quoting *Posada v. Lamb County*, 716 F.2d 1066, 1072 (5th Cir. 1983)).

The recently-enacted legislation grants Plaintiffs one of the two remedies sought by the Plaintiffs, and the one granted by the District Court – a new election upon the convention question. This legislative relief comes no later than would have likely have been ordered by this Court had Plaintiffs prevailed in this Court's March 27, 1998, decision, or June 23, 1998, order, and, in any case, demonstrably sooner than would have been ordered by the Supreme Court of the United States if this case were granted review on the merits and argued during the October 1998 Term. "Cessation of the government's erstwhile policy . . . is, after all, 'essentially the same as the injunctive relief sought in the complaint,' " *Sablan*, 856 F.2d at 1327.

The chronology of events as well as the contemporaneous history of HB 3130 also show a "clear, causal relationship between the litigation brought and the practical outcome realized." *Rutherford v. Pitchess*, 713 F.2d 1416, 1419 (9th Cir. 1983).

Prior to the filing of this lawsuit and the issuance of an injunction by the District Court, no one in state government took a single step to address the unfairness of the retroactive enforcement of the *Yoshina* decision. The Attorney General, as the chief legal officer of the State, did not seek reconsideration of the decision in the Hawaii Supreme Court pursuant to Haw. R. App. P. 40, and she let expire the time in which to seek review in the Supreme Court of the United States pursuant to 28 U.S.C. § 1257. The Chief Election Officer, so far as the record shows, did not request the Attorney General to pursue either of these two avenues for correcting *Yoshina*. Nor did the Governor. No member of the Legislature took steps in the 1997 legislative session to hold a new plebescite; likewise, the Governor did not call on the Legislature to act in the time remaining in the regular session; nor did he call a special legislative session.

On January 28, 1998, after the briefs in this case were filed and the case was argued, HB 3130 was introduced by Speaker of the Hawaii House of Representatives Joseph Souki. *See* Michaels Ex. 1. At February hearings before the House Judiciary Committee, counsel for plaintiffs advanced testimony of Defendant Yoshina, other evidence that had been gathered below, and the ruling of the District Court – support that would not have existed but for prosecution of the suit – as justifying passage:

> Regardless of whether one believes the Hawaii Supreme Court was right or wrong in deciding that blank ballots count in determining a majority on the constitutional convention question, it is beyond dispute that no one knew in advance of the last election that those were the ground

> rules. In fact, as we pointed out in our lawsuit, the State Office of Elections told voters over the telephone, through written fact sheets, and on the Internet, that blank ballots would *not* count in determining a majority on the convention question. In a deposition in the Con Con lawsuit, Chief Election Officer Dwayne Yoshina testified it would have been impossible for any voter to have known prior to voting that blank votes would count as ballots cast on the question – essentially as 'no' votes. It is not possible that the election could have been fair, if those 40,000 people who thought they were not voting, had no way of knowing that their blank ballots were 'no' votes. This is exactly what Judge Ezra found. Even Mr. Yoshina testified that the election was not fair, and that it would be more fair to have a new election.

Michaels Ex. 2. In its February 18, 1998, report, the House Judiciary Committee expressly cited the lawsuit and Judge Ezra's orders as both placing a spotlight upon as well as generating the "controversy" and "confusion" that required legislative action:

> Your Committee finds that there was a tremendous amount of controversy over the constitutional convention question that was placed on the ballot at the 1996 general election. There was disagreement over whether blank ballots and spoiled ballots, or ballots marked both "yes" and "no," should be counted in determining a majority on the convention question.
>
> Lawsuits were filed in both state and federal courts on this issue. The Hawaii Supreme Court decided in March 1997, that blank ballots and spoiled ballots did count in determining the

> amount of ballots cast. As a result, the court held that the proposition failed.
>
> The United States District Court for the District of Hawaii decided in July 1997, that, because the electorate was told prior to the 1996 election that blank ballots would not be counted for any purpose, the Hawaii Supreme Court's post-election decision rendered the election on the constitutional convention question fundamentally unfair. As a result, the [District Court] held that the results of the constitutional convention question were void and that the State had to hold a new special election on this issue within sixty days. That decision was appealed to the United States Court of Appeals for the Ninth Circuit.

Michaels Ex. 3. Against the background of its express acknowledgement of the evidentiary record, the holding of Judge Ezra, and the pendency of the litigation, the Committee concluded that "because of the confusion over the constitutional convention question at the 1996 general election, the Legislature again should place this question on the ballot to be voted upon at the 1998 general election." *Id.* According to the committee Report, Defendant Yoshina, having been placed on record during his deposition in this case, testified in favor of HB 3130. *Id.*

Based on this report, the bill passed the House of Representatives, and crossed over to the Hawaii State Senate.

On April 6, 1998, after this Court had issued its initial opinion, but before the time in which to seek rehearing expired, the Hawaii Senate Judiciary Committee held hearings on HB 3130. Again, plaintiffs' counsel submitted

written testimony to the Committee setting forth the evidence and testimony that was gathered in the Court below, and cited those aspects of this Court's opinion that supported Plaintiffs' constitutional claim (and which were later the basis in part of the Rule 40 Petition):

> Perhaps the most telling statement in the Ninth Circuit's decision was that "Hawaii used to interpret voter indifference as a reason neither for nor against amending the state constitution, but now interprets voter indifference as a reason not to convene a constitutional question. This ex post clarification of the state's election laws" does not amount to [a] federal violation. While this may be the case, an ex post facto change in the rules, which changes the results of an election, give[s] a very strong reason for allowing the voters a new election. While I disagree with the Ninth Circuit's view of federal law, there is nothing in the opinion which detracts from the proposition that it would have been impossible for any voter going to the polls to know that his turning in a blank ballot would count as a no vote, and there is nothing in the opinion which detracts from the proposition that the Hawaii Supreme Court changed the rules after the election.

Michaels Ex. 4. Citing the same "controversy" and "the ensuing debate regarding placing the question before the voters" as moved the House Judiciary Committee, the Senate Judiciary Committee recommended passage of HB 3130, as amended, on April 9, 1998, one day before the filing of Plaintiffs' Petition for Rehearing. *See* Michaels Ex. 5. While the Petition for Rehearing was pending, the Senate passed the bill on April 14, 1998, and the House

acceded to the Senate's technical amendments on April 29, 1998. Michaels Exs. 6-7. The Office of the Governor received the bill on May 1, 1998. Michaels Ex. 7. Two days after the Court denied rehearing, and as time for seeking review in the Supreme Court of the United States began to run, Defendant Cayetano, in his capacity as Governor of Hawaii, signed the bill. Michaels Ex. 8.[2]

This historical accounting shows that "the lawsuit was causally linked to the relief actually obtained." *Sablan,* 856 F.2d at 1335. *See Sable Communications,* 890 F.2d at 192 (mere contemporaneous notation in the administrative record that a defendant "is in federal court litigating this issue" is enough to support finding of causation, *even* if state administrative judge testifies that the federal litigation "was not a catalyst."). Here, at every stage in the legislative history, there was express or implied acknowledgment by the House and Senate Judiciary Committees of the pendency of the federal case and the "controversy" it reflected and raised in the public mind. At every stage in the legislative process, Defendants' admissions and the documentary evidence gathered in the Court below were submitted as support for legislative action. This is not a case where Plaintiffs rely solely on the sequence of chronological events. *See Braafladt v. Board of Governors,* 778 F.2d 1442, 1444 (9th Cir. 1985); *Beach v. Smith,* 743 F.2d 1303, 1306-07 (9th Cir.

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[2] The Governor's endorsement of the measure constituted a change in his previously announced position that he "is opposed to a Con Con but . . . would not veto the bill." *See* Michaels Ex. 9.

1994). Bearing in mind the rule in this Circuit that "defendants, on the whole, are usually rather reluctant to concede that the litigation prompted them to mend their ways," *Sablan*, 856 F.2d at 1326, the record unquestionably shows that Plaintiffs' lawsuit "had an impact" at the legislative level. *See Rutherford v. Pitchess*, 713 F.2d 1416, 1419 (9th Cir. 1983).[3]

The facts of the instant case contrast sharply with those in *American Constitutional Party v. Munro*, 650 F.2d 184 (9th Cir. 1981), where a District Court, sitting as the finder of fact, rejected a "catalyst" claim by a group that had sued the Washington Secretary of State to compel changes in certain election laws. Unlike Plaintiffs here, the American Constitutional Party never won any relief in the District Court, and, consequently, there was never the sort of litigation pressure that attended this case, where Defendants, as a result of the Plaintiffs' victory in the District Court, bore the risks of proceeding as appellants in the federal judicial system. *See* 650 F.2d at 186 n.4. In addition to this important difference, the legislative history in Washington State indicated that the requested legislative changes had been proposed by the Secretary of State himself more than two years before the suit was filed, and had been supported by a lengthy staff analysis stating that the changes were required by "recent U.S.

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[3] Indeed, that Governor Cayetano not only signed HB 3130 into law, but did so before the period in which to veto or sign expired, is further evidence of the requisite "causal link." That action wisely "stopped the clock" on the merits at a time when Plaintiffs would reasonably be incurring even more fees and costs as they prepared to seek full merits review of this Court's decision in the United States Supreme Court.

Supreme Court decisions." *Id.* at 189 (Thompson, J., concurring).

In *Munro,* in contrast to this case, the only evidence of the lawsuit's causal effect was an affidavit of a single conference committee member a year after the fact stating that the suit at issue had been "discussed" during the legislative process. This Court upheld the District Court's factual finding of no causation, noting that the affidavits "were not made contemporaneously with the passage of the legislation" and stated only that the suit was "discussed." 650 F.2d at 188. "[P]roposed changes in the statute had been kicking around for years, often initiated by the Secretary's own office." *Id.*

Here, by contrast, there is no evidence that, prior to bringing suit, or even prior to Judge Ezra's entry of summary judgment, anyone in state government took the issues presented by this case seriously enough to act. In addition, here, unlike *Munro,* Plaintiffs have presented the contemporaneous reports of the Hawaii House and Senate Judiciary Committees, each of which reference, expressly or impliedly, the "controversy" reflected in, and raised by, Plaintiffs' lawsuit, Judge Ezra's order, and the testimony of Defendant Yoshina himself. In these committees' words their action was at least in part "because" of this federal lawsuit. *Cf. Munro,* 650 F.2d at 189 (Thompson, J.) (lawsuit filed "[a]fter all this spade work [by Defendants] was done").

B. There Is Also a Legal Basis for Plaintiffs' Claims.

Even though Plaintiffs lost on the merits of their legal claims before this Court, "the law of this circuit . . . [is that] a claim has a basis in law so long as it is not 'frivolous, unreasonable, or groundless.' " *Stivers*, 71 F.3d 732, 752 (9th Cir. 1995) (quoting *Sablan*, 856 F.2d at 1327 (quoting in turn *Fitzharris v. Wolff*, 702 F.2d 836, 836 (9th Cir. 1983))). *See Doty v. County of Lassen*, 37 F.3d 540, 548 (9th Cir. 1994). Indeed, the issue of whether Plaintiffs' claim for a new election was "frivolous, unreasonable, or groundless" is properly one upon which Defendants bear the burden of proof. *See Richard v. City of Pasadena*, 889 F. Supp. 384, 388 (C.D. Cal. 1995) (noting that other circuits place the burden on defendant for second prong of "catalyst" test, and holding that plaintiff had legal basis for First Amendment claim). Whoever has the burden on this issue, it is obvious that Plaintiffs meet the second requirement.

Here, no one has ever asserted that Plaintiffs' claims were frivolous; indeed, the District Court below granted summary judgment on the principal federal claim for relief asserted below. This Court's lengthy published opinions in this case, coming after the Court granted extended argument, further reflect the substantiality of Plaintiffs' claims. There was a "legal basis" for the claim for the new election sought here.

II. Given the Nature of the "Catalyst" Inquiry, And To Avoid Confusion in the District Court, the Court Should Transfer this Request for Attorneys Fees and Costs to the District Court Pursuant to Ninth Circuit Rule 39-1.8; This Court May, And Should, Recall the Mandate If That is Necessary to this Disposition.

A. The District Court Should in the First Instance Resolve the Issue of "Prevailing Party" Status.

Although the foregoing analysis shows that Plaintiffs must, as a matter of law, be found to have "prevailed," at a minimum it demonstrates why the issue of "prevailing party" status should be dealt with in the first instance by the District Court. As this Court has repeatedly held, "[w]hether a party has shown a causal nexus between the lawsuit and the action taken is a factual determination *for the district court.*" *McQuiston v. Marsh*, 707 F.2d 1082, 1085 (9th Cir. 1983) (emphasis added). This Court is "loath to second-guess the probative value that the district court assign[s] to the sequence of events prior and subsequent to the commencement of . . . suit." *Sablan*, 856 F.2d at 1326. *Accord, Goehring v. Brophy*, 94 F.3d 1294, 1304 (9th Cir. 1995); *Stivers*, 71 F.3d at 752; *Sable Communications*, 890 F.2d at 192-93. *See also Munro*, 650 F.2d at 186 (ruling on "catalyst" claim is not "a summary judgment," but is factual question that is subject to review for "abuse of discretion"); *id.* at 188 n.17 (litigants who request as do Plaintiffs here are entitled to "an evidentiary hearing on whether the plaintiff's lawsuit was a significant catalyst for change").

Here, the District Court has never had an opportunity to make a "catalyst" determination, and, at a minimum, Plaintiffs have sufficient evidence that the passage of HB 3130 was causally linked to their lawsuit that they are entitled to an evidentiary hearing on that issue. Under this Court's precedents, and as a matter of general appellate procedure, this Court generally does not sit as a fact finder, in attorneys' fees matters or otherwise, and the proper disposition of Plaintiffs' fee petition is for that petition to be adjudicated first by the District Court.[4]

B. The Mandate Does Not Preclude Consideration By the District Court of Plaintiffs' Claim For Fees and Costs Based on Facts that Arose Three Days After this Court Denied Rehearing.

Because the facts giving rise to Plaintiffs' prevailing party status did not arise until after this Court denied rehearing, the rules governing the construction of the appellate mandates and federal Due Process precepts do not render the mandate in this case preclusive of a "catalyst" recovery.

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[4] Because numerous other issues, such as the prevailing rates for legal services in Hawaii, and the experience of counsel, are peculiarly within the expertise of the trial court, transfer of the fee petition is warranted not only as to whether Plaintiffs were "prevailing parties," but what the "reasonable fee" should be.

1. Aside From Constitutional Considerations, the "Mandate Rule" Does Not Bar the District Court From Considering Plaintiffs' Fees/Costs Claim.

The general rule is that "although the mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court, it 'leaves to the district court any issues not expressly or impliedly disposed of on appeal.' " *Nguyen v. United States*, 792 F.2d 1500, 1501 (9th Cir. 1986) (quoting *Stevens v. F/V/ Bonnie Doon*, 731 F.2d 1433, 1435 (9th Cir. 1984)). The "mandate rule," on its face, clearly permits the District Court, without a recall of the mandate, to determine that Plaintiffs were "prevailing parties," and to award them their reasonable attorneys fees and costs on appeal, as the panel could not have "expressly or impliedly disposed of" the issue of whether the Governor's June 26, 1998, action rendered Plaintiffs "Prevailing parties" under § 1988, because the fact of that action *did not exist* when the Court acted on the Petition for Rehearing three days earlier. That the mandate states that "Yoshina shall recover his costs on appeal from Bennett" and "Bennett and the AFL-CIO shall bear their own costs on appeal" simply does not resolve, expressly, or impliedly, the issue presented by the post-June 23, 1998, developments. Accordingly, it would be proper for the District Court to grant Plaintiffs their fees and costs on appeal, even without a recall of the mandate or even without further express action by this Court to transfer the consideration of the fees and cost petition to the Court below.

2. The Due Process Clause of the Fifth Amendment Requires this Court to Construe the Mandate as Not Barring Plaintiffs From Seeking Their Fees and Costs on Appeal Pursuant to 42 U.S.C. § 1988.

Even apart from the foregoing, the mandate cannot be viewed as barring Plaintiffs' claims under § 1988 because to hold otherwise would be unconstitutional. Here, it must be stressed that the Article III judges who acted on this case last did so on June 23, 1998. The mandate of this Court issued *automatically* on June 30, 1998, pursuant to Fed. R. App. P. 41. Because of this fact, that the Governor signed HB 3130 on June 26, 1998, before the mandate issued, cannot lead to a constitutional construction of the mandate as "adjudicating" the instant claim under § 1988.

In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1981), the Supreme Court held that the use of an automatic processing deadline that had the effect of destroying a litigant's state-created employment practices claim violated the Due Process Clause of the Fourteenth Amendment. Under the Illinois scheme, if the state fair employment practices agency failed to issue a complaint within 180 days following a statutory conciliation period, the claimant's charge was deemed forfeited. The Supreme court held this procedure unconstitutional, because it deprived Mr. Logan of the right "to have [a factfinder] consider the merits of his charge, based upon the substantiality of the available evidence, before deciding whether to terminate a claim." 455 U.S. at 434. Because the Illinois system "deprives persons of their claims in a random manner[,]" it was invalid. *Id.*

Here, to construe the mandate as precluding a § 1988 recovery would violate *Logan's* core holding. No judicial officer has yet passed on Plaintiffs' claim based on the June 26, 1998, order, and any argument that the mandate adjudicated that claim would arise not from any review of the merits of the claim, but rather because of the automatic operation of Fed. R. App. P. 41(a). Thus, the mandate cannot bar Plaintiffs § 1988 claim.

C. The Court Should, Nonetheless, Transfer By Express Order the Plaintiffs' Fees and Costs Petition to the District Court For a Ruling on its Merits; If the Court Determines that it is Necessary to Recall the Mandate to Achieve This, This Court's Rulings Require Such a Recall.

Despite the above, it would obviously curtail needless litigation if the Court were to enter an express order transferring Plaintiffs' fees and costs petition to the District Court for decision on its merits. Ninth Circuit Rule 39-1.8 states:

> Any party who is or may be eligible for attorneys fees on appeal to this Court may, within the time permitted in Circuit Rule 39-1.6, file a motion to transfer consideration of attorneys fees on appeal to the district court or administrative agency from which the appeal is taken.

Ninth Cir. R. 39-1.8 (emphasis added). This language is plainly applicable to this circumstance, and Plaintiffs' motion is timely. *See* Ninth Cir. R. 39-1.6 (fourteen day deadline).

Per the foregoing, a recall of the mandate should not be required to effect a transfer permitting the District Court to grant Plaintiffs fees and costs on appeal. Moreover, that Fed. R. App. P. 41(a) triggers an automatic issuance of the mandate seven days before Ninth Circuit Rule 39-1.8 contemplates a motion for transfer being filed suggests that Plaintiffs' motion for transfer may be granted without a recall of the mandate.

However, if the Court views the mandate as in any way preclusive of Plaintiffs' claims under § 1988 and their motion for transfer, this Court's ruling in *Verrilli v. City of Concord*, 557 F.2d 664 (9th Cir. 1977), fully supports a recall of the mandate and an amendment thereof under the instant circumstances.

In *Verrilli*, a civil rights plaintiff in an attorneys' fees appeal had failed to call to the panel's attention the passage of the 1976 amendments to § 1988, even though the Act became law only five weeks after argument, and nearly three *months* before the time expired for petitioning for rehearing. *See* 557 F.2d at 664. As a consequence, the panel's opinion (and the resulting mandate) limited Plaintiff's fees and costs claim on remand to the "bad faith" standard. *Id.* on appeal from the District Court's denial of attorneys fees, the Court held:

> Because of an overpowering sense of fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice, we act to free the hand of the district court from any strictures of the "law of the case" on the former remand. *Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248 (9th Cir. 1975); *Greater Boston Television Corp.*

> *v. F.C.C.*, 463 F.2d 268 (D.C. Cir. 1971). Our prior ruling was not merely an erroneous one, *Powers v. Bethlehem Steel Corporation*, 483 F.2d 963 (1st Cir. 1973); it was an unintended unjust result in that it deprived the appellant of a lawful statutory right to invoke the discretion of the district court under the Act and the holding in *Stanford Daily* [Act applies to pending case].

557 F.2d at 665.

This reasoning cuts in Plaintiffs' favor *a fortiori*. For here, unlike *Verrilli* itself, Plaintiffs could not have brought the fee-entitling action to the attention of this Court prior to the denial of rehearing – that action did not yet exist. At a very minimum, if the mandate is viewed by the Court as in any manner preclusive of Plaintiffs' claims under § 1988, *Verrilli* not only provides authority for, but compels, a recall of the mandate and an amendment thereto transferring Plaintiffs' claim for consideration on its merits by the District Court.

III. At a Very Minimum, The Court Should Grant Plaintiffs' § 1988 Fees and Costs Petition Itself Or Refer the Petition to the Appellate Commissioner; If the Mandate Must Be Recalled to Aid This Result, The Court Should Do So Pursuant to Verrilli.

Although the proper analysis requires Plaintiffs' fees and costs petition to be adjudicated first in the District Court, if the Court believes otherwise Plaintiffs request this Court to adjudicate the petition itself, or to refer such parts of it as the Court finds appropriate to the Appellate Commissioner pursuant to Ninth Circuit Rule 39-1.9. If

the Court believes that a recall of the mandate is required to achieve this result, the court should recall the mandate pursuant to the *Verrilli* ruling.

IV. Plaintiffs' Reasonable Fees and Costs on Appeal.

Under the controlling precedents interpreting § 1988, the Court's calculation of the attorneys' fee and costs award begins with the determination of the "lodestar" figure, which is " 'the product of reasonable hours times a reasonable rate.' " *Burlington v. Dague*, 505 U.S. 557, 559 (1992) (quoting *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546, 565 (1986)). As this Court explained recently:

> The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate. *McGrath v. County of Nevada*, 67 F.3d 248, 252 (9th Cir. 1995). After making that computation, the district court then assesses whether it is necessary to adjust the presumptively reasonable lodestar figure on the basis of the *Kerr* factors that are not already subsumed in the initial lodestar calculation.

Morales v. City of San Rafael, 96 F.3d 359, 363-64 (9th Cir. 1997). The twelve *Kerr* factors, *see Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976), are as follows:

(1) The time and labor required;

(2) The novelty and difficulty of the questions involved;

(3) The skill requisite to perform the legal service properly;

(4) The preclusion of other employment by the attorney due to acceptance of the case;

(5) The customary fee;

(6) Whether the fee is fixed or contingent;

(7) Time limitations imposed by the client or the circumstances;

(8) The amount involved and the results obtained;

(9) The experience, reputation, and ability of the attorneys;

(10) The "undesirability" of the case;

(11) The nature and length of the professional relationship with the client;

(12) Awards in similar cases.

Morales, 96 F.3d at 364 n.8. "There is a strong presumption that the lodestar figure represents a reasonable fee[,]" and '[o]nly in rare instances should the lodestar figure be adjusted on the basis of other considerations.' " *Id.* In this instance, Plaintiffs seek a "lodestar" recovery of $86,366.25 in attorneys fees for the work of two attorneys at the following three stages of this litigation: (1) the "application for stay" stage; (2) the "merits briefing and oral argument" stage; and 3) the "rehearing" stage. No compensation for time since the motion to stay consideration of the petition for rehearing is requested, though

such work, including preparaing [sic] this petition, is compensable.[5]

Plaintiffs do not request an upward multiplier based upon the *Kerr* factors, but likewise they submit that the *Kerr* factors do not permit any downward adjustment of the lodestar.

Plaintiffs' attorneys and legal assistants (paralegals) and library staff billed at least 648.3 hours to this matter since August 1, 1997, but Plaintiffs, in the exercise of billing judgment, and in light of the rule of *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) (holding that fees may be awarded against putative intervenors only if the intervenors' action was "frivolous, unreasonable, or without foundation"), seek recovery for only a portion of those hours.

Recovery is therefore sought for the work of only Mark Bennett (136.7 hours) of McCorriston Miho, Miller, Mukai, in Honolulu, Hawaii, and Steven Michaels ("undersigned counsel") (247.15 hours) of Debevoise & Plimpton, in New York City. The amounts to be received by each firm for this work is as follows:

McCorriston Miho Miller Mukai

136.7 hours @ $225 per hour $30,757.50

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[5] *See Clark v. City of Los Angeles*, 803 F.2d 987, 992 (9th Cir. 1986) ("[T]he time spent in establishing entitlement to an amount of fees awardable under section 1988 is compensable").

Debevoise & Plimpton

247.15 hours @ $225 per hour $55,608.75

Total $86,366.25

To avoid any dispute, Plaintiffs are not submitting claims for (1) more than twenty hours of time spent by Debevoise partner Michael Wiles, who reviewed drafts and made comments thereon and was the supervising partner at Debevoise on this matter, (2) more than seventy hours of time spent by two New York summer associates who worked on the matter as well (3) paralegal time and library services at Debevoise. *See* Michaels Ex. 10.

In addition, Plaintiffs do not seek compensation for their New York counsel at New York rates ($334 for undersigned counsel), and thus do not seek an exception to the general rule stated in *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984), and *Davis v. Mason County*, 927 F.2d 1473, 1488 (9th Cir. 1991), that compensation must be in line with "prevailing market rates in the relevant community" where the litigation was originally venued. Thus, compensation for the time of undersigned counsel will be based at the $225 per hour rate sought by Mr. Bennett (and which the District Court has already approved in the order in the related fee appeal). Support for charging the time of undersigned counsel (who is a member of the Hawaii bar and who practiced law in Hawaii for approximately eleven years) at at least the rate of $225 per hour is set forth at Michaels Decl. ¶¶ 1-7.

Plaintiffs have deducted 44.85 hours from undersigned counsel's total time of 372.1 hours for work on the intervention appeals (including all travel time to and from San Francisco and the time arguing the intervention appeals). Plaintiffs have also deducted 23.8 hours of Mr. Bennett's total time of 160.50 hours and an additional 47.2 hours of undersigned counsel's time, for work on and related to the Plaintiffs' Reply Brief in support of their cross-appeal and on matters pertaining to related appeals.

As stated above, no compensation is sought for the undersigned counsel's efforts in preparing this petition and work since the Petition for Rehearing was filed (31.5 hours).

In addition, no compensation is sought for the undersigned's hotel, airfare, meals, or travel, though these are generally billed separately in Hawaii and are eligible for compensation under § 1988. Plaintiffs also do not seek a delay-in-payment adjustment, even though that is authorized by case law. *See Missouri v. Jenkins*, 491 U.S. 274, 282-83 (1989).

Costs for other itemized disbursements related to the merits appeals (duplicating, Westlaw, courier services, postage, telephone and fax charges) are sought as part of customary billing in Hawaii as follows. In an exercise of billing judgment and to avoid dispute, each of the disbursement categories sought for Debevoise & Plimpton and McCorriston Miho Miller Mukai (with the exception of Mr. Bennett's travel expense) have been calculated by taking the charges for the litigation and dividing them in *half*. These cost items are routinely billed to clients in

Hawaii separate, apart, and in addition to hourly charges for attorneys fees (*see* Michaels Decl. ¶ 8), and are accordingly compensable as part of the "reasonable attorneys fee" allowed by § 1988. *Davis v. Mason County*, 927 F.2d 1473, 1488-89 (9th Cir. 1991). *See also Missouri v. Jenkins*, 491 U.S. 274, 286-87 (1989) (awarding paralegal costs at charged hourly rates is mandated if that is the custom in the relevant community). Other categories of disbursements, some or all of which may be billable in Hawaii practice, are eliminated in an effort to avoid dispute herein.

Compensation for disbursements is sought for:

McCorriston Miho Miller Mukai Disbursements:	
Express deliveries	$107.00
Duplicating	$718.20
Telephone toll charges	$31.70
Fax charges	$233.00
Travel expense	$588.73
McCorriston Miho Miller Mukai Total	$1,678.43

Debevoise & Plimpton Disbursements:	
Express deliveries/messengers	$262.25
Duplicating	$612.50[6]

[6] Duplicating charges have been halved again in light of the District Court's determination that 10 cents per page is the appropriate amount to charge in Hawaii, whereas Debevoise

Telephone toll charges	$44.52
Fax charges	$1199.00
Postage	$81.00
Westlaw	$3534.00
Debevoise & Plimpton Total	$5,733.47
Disbursements Total	$7,411.90

It is also customary in Hawaii for private lawyers to charge to their clients the 4.16% State general excise tax on all charged legal services (attorney time). Michaels Decl. ¶ 8. Reimbursement for that amount is also proper. *See Davis, supra.*

The requested amount therefore consists of attorneys' hourly charges of $86,366.25 for 383.85 hours of work claimed, other costs of $7,411.90 for work on appeal, plus taxes of $3,592.83, for a total of $97,370.98. (Since the State of Hawaii will ultimately recover the $3,592.83 in tax charges, the net cost to the State will be $93,778.15.)

The requested amount, which should be taxed against Defendants in their official capacities,[7] is reasonable. " '[T]he most critical factor' in determining the reasonableness of a fee award 'is the degree of success

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charges its clients 20 cents a page. The McCorriston Miho billing records already record the costs of xeroxing at 10 cents per page. Bennett Ex. 2.

[7] Pursuant to *Kentucky v. Graham*, 473 U.S. 159 (1985), none of the fees and requested disbursements will be paid by Defendants out of their individual funds. Rather, because this is an "official capacity" action, the costs of the litigation will be spread over the taxpayers of Hawaii. With a population of approximately one million, this translates into 9.4 cents per

obtained.' " *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (quoting *Hensley*, 461 U.S. at 436). Only sixteen months after *Yoshina* was issued, a new election where the *Yoshina* rule will be disclosed to the voters in advance has been secured. That election will take place only two years after the last election, less than eleven months after the date the trial court itself mandated in its injunction. Had the legislation not been passed, the citizens of Hawaii would have had to wait until the year 2006 to be able to vote as of right on the question.

The fact that the Plaintiffs lost the battle in court but won the war legislatively is of no moment. As stated in *Cabrales v. County of Los Angeles*, 935 F.2d 1051 (9th Cir. 1991):

> We read *Hensley* as establishing the general rule that plaintiffs are to be compensated for attorney's fees incurred for services that contribute to the ultimate victory in the lawsuit. Thus, even if a specific claim fails, the time spent on that claim may be compensable, in full or in part, if it contributes to the success of other claims. *See id.* at 435. We analogize from *Hensley's* discussion of different claims to the different stages of litigation at issue here. Just as time spent on losing claims can contribute to the success of other claims, time spent on a losing stage of litigation contributes to success because it constitutes a step toward victory. [footnote omitted]

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citizen for the benefit of having a new election that offers to change the course of the State's history.

935 F.2d at 1052. As in *Cabrales*, even though Plaintiffs were unable to defeat Defendants' application for stay, and were not able to obtain a favorable judgment in this Court, this Court's orders were "simply a temporary setback on the way to a complete victory for plaintiffs" on their prayer for a new election. *Id.* at 1053. Moreover, Plaintiffs' request in their cross-appeal for the remedy of an order certifying that the convention question had passed in 1996, was "related" for purposes of *Hensley's* analysis, and was part of the litigation package that contributed to the success of other claims. *Cabrales*, 935 F.2d at 1052. Plaintiffs' two requested remedies, one which was granted, and one which was not, were not "distinctly different claims for relief that are based on different facts and legal theories." *Hensley*, 461 U.S. at 434. Both forms of relief were inextricably related to the single central claim in the litigation – namely, that *Yoshina's* retroactive enforcement violated the Constitution.

"Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley*, 461 U.S. at 435. Certainly, no one can deny that the passage of unprecedented corrective legislation granting a new election on whether the people should hold a constitutional convention is anything less than an "excellent result" for the Plaintiffs.

Plaintiffs' requested fees are reasonable not only under this line of analysis, but withstand scrutiny even when examined at a litigation-stage-by-litigation-stage level.

[Material Deleted in Printing]

V. Vacatur of the Judgment on the Merits.

Had Defendants' appeal "become moot while the petition for rehearing and suggestion for rehearing en banc were still pending and before the mandate issued, the appropriate disposition [would have been] to vacate the panel's opinion and dismiss the appeal." *Independent Union of Flight Attendants v. Pan American World Airways*, 966 F.2d 457, 459 (9th Cir. 1992). As briefed above, the continued existence of the panel judgment does not preclude Plaintiffs' fees and costs petition, and, in any case, the constitutional considerations implicated in recalling the mandate for purposes of expressly allowing Plaintiffs' petition under § 1988 to go forward place such a recall on a different, *i.e.*, stronger, footing than are implicated by a recall of the panel judgment on the merits. If the Court, for example, recalls the mandate for the purpose only of addressing fees and costs, Plaintiffs still could petition for certiorari so that the Supreme Court itself could vacate this Court's judgment as moot. Plaintiffs could also possibly seek dismissal in the court below.

Nonetheless, particularly if the Court recalls the mandate for other purposes, it would be appropriate to recall the mandate for the purposes of vacating the panel's merits judgment as well. This is not an instance where a recall of the mandate is sought after certiorari is denied. Rather, here, recall of the mandate for purposes of vacating the judgment, and dismissing the appeal in No. 96-16408, would efficiently spare the Supreme Court of having to exercise its certiorari powers for the purpose of granting a routine vacatur. *See, e.g., Department of the Treasury v. Galioto*, 477 U.S. 556, 560 (1986). Accordingly, the panel judgment in No. 97-16408 should be vacated,

the appeal dismissed, and the cause remanded to the District Court with instructions to dismiss the Complaint's prayer for a new election. Because such a result would "de-moot" the cross appeal, Plaintiffs suggest that, because they have already sought rehearing once, it would be appropriate to affirm the judgment of the District Court as to the remedy sought in Cross-Appeal No. 97-16543, for the reasons found by the District Court. That disposition would leave only a narrow opinion as to remedies and would leave the issues of underlying Due Process liability to be litigated another day in a case where such equitable adjudication is fully required throughout the entire appellate process.

CONCLUSION

For the foregoing reasons, the Court should:

(1) By express order pursuant to Circuit Rule 39-1.8, transfer Plaintiffs' claim for attorneys' fees and other costs to the District Court for an adjudication on its merits in light of the Governor's action in signing HB 3130 into law, and recall the mandate and vacate the Court's judgment as to costs if that is necessary to effect such a transfer;

(2) Alternatively, grant Plaintiffs, motion for an award of attorneys' fees and other costs on appeal in the amount of $86,366.25 in fees and $7,411.90 in disbursements, plus customarily-billed state general excise taxes of $3,592.83, or refer the matter to the Appellate Commissioner for final adjudication or recommendation under Circuit Rule 31-1.9, and recall the mandate and vacate the

Court's judgment as to costs if that is necessary to effect such a result;

(3) Particularly if the Court is inclined to recall the mandate for other purposes, recall the mandate and vacate the judgment as to its merits in No. 97-16408, dismiss Defendants' appeal, affirm the judgment in No. 97-16543 for the reasons stated by the District Court, and remand with instructions to dismiss the complaint's prayer for a new election on the convention question as moot.

Respectfully submitted: July 6, 1998.

McCORRISTON MIHO MILLER MUKAI
MARK J. BENNETT, ESQ.
DEBEVOISE & PLIMPTON

/s/ Steven S. Michaels
STEVEN S. MICHAELS, ESQ.
Attorneys for Plaintiffs-Appellees, Cross-Appellants

EXHIBIT 1

H.B. NO. 3130

HOUSE OF REPRESENTATIVES
NINETEENTH LEGISLATURE, 1998
STATE OF HAWAII

A BILL FOR AN ACT

RELATING TO A CONSTITUTIONAL CONVENTION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Article XVII, Section 2, of the Constitution of the State of Hawaii provides that the legislature may put to the electorate at any general or special election the question of whether there shall be a convention to propose a revision of or amendments to the State Constitution. The purpose of this Act is to submit such question to be placed on the ballot and to be voted upon at the general election of 1998.

SECTION 2. The question to be placed on the ballot shall be as follows:

> "Shall there be a convention to propose a revision of or amendments to the constitution?"

SECTION 3. The ballot shall have designated spaces to mark YES or NO. The proposal shall be considered approved only if approved by a majority of all votes tallied upon the question.

SECTION 4. This Act shall take effect upon its approval.

INTRODUCED BY: /s/ Joseph Souki
By Request

/s/ Robert Oshiro
By Request
Jan. 28, 1998

EXHIBIT 2

McCorriston Miho Miller Mukai
ATTORNEYS AT LAW

February 11, 1998

Via Facsimile: 586-6501

Representative Terrance W.H. Tom
Chairman, House Judiciary Committee
State Capitol
Honolulu, Hawaii 96813

Re: Written Testimony of Mark J. Bennett Regarding House Bill 3130 Set for Hearing Before the House Judiciary Committee on February 12, 1998 at 2:00 p.m.

Dear Representative Tom:

I write this letter in support of House Bill 3130, which would place on the 1998 General Election Ballot, the question of whether Hawaii should hold a constitutional convention. I have been in the forefront of the battle over the 1996 general election, and as you know, filed a lawsuit against the State, seeking either an order that a convention be held, or a new election. Judge Ezra ordered

a new election, and that issue is currently on appeal before the United States Court of Appeals for the Ninth Circuit. It is my belief that were House Bill 3130 to pass, that would moot that lawsuit.

Regardless of whether one believes the Hawaii Supreme Court was right or wrong in deciding that blank ballots count in determining a majority on the constitutional convention question, it is beyond dispute that no one knew in advance of the last election that those were the ground rules. In fact, as we pointed out in our lawsuit, the State Office of Elections told voters over the telephone, through written fact sheets, and on the Internet, that blank ballots would *not* count in determining a majority on the convention question. In a deposition in the Con-Con lawsuit, Chief Election Officer Dwayne Yoshina testified it would have been impossible for any voter to have known prior to voting that blank votes would count as ballots cast on the question – essentially as "no" votes. It is not possible that the election could have been fair, if those 40,000 people who thought they were not voting, had no way of knowing that their blank ballots were "no" votes. This is exactly what Judge Ezra found. Even Mr. Yoshina testified that the election was not fair, and that it would be more fair to have a new election.

It is of course not possible for the Legislature to right every wrong that occurs. The difficulty of righting wrongs is compounded by the fact that one person's grave injustice is another person's correct decision. In this case, however, it is hard to see how any person could argue that putting this question back on the ballot would be anything other than the right thing to do.

Even if the matter is put on the 1998 ballot, those who want a convention will have a difficult time, because blank ballots will count as "no" votes pursuant to the Supreme Court's decision. At least, however, this time everyone will know the rules in advance. Everyone will have a fair opportunity to campaign, and those voters who still wish not to vote will at least do so knowingly – they will know that not casting a ballot on the constitutional convention question will mean that they will be voting "no".

On my own behalf, and on behalf of those who joined with me in the Con-Con lawsuit, I urge the Committee to pass this Bill as swiftly as possible.

Very truly yours,

/s/ Mark J. Bennett
Mark J. Bennett

MJB:aw

EXHIBIT 3

STAND. COM. REP. NO. 229-98

Honolulu, Hawaii
February 18, 1998

RE: H.B. No. 3130
H.D. 1

Honorable Joseph M. Souki
Speaker, House of Representatives
Nineteenth State Legislature
Regular Session of 1998
State of Hawaii

Sir:

Your Committee on Judiciary, to which was referred H.B. No. 3130 entitled:

"A BILL FOR AN ACT RELATING TO A CONSTITUTIONAL CONVENTION," begs leave to report as follows:

The purpose of this bill is to present to the electorate at the general election of 1998 the question of whether there shall be a convention to propose a revision of or amendments to the State Constitution.

The Chief Election Officer, the Mayor of the City and County of Honolulu, representatives from Let the People Decide, Citizens for a Constitutional Convention, and several individuals testified in support of this bill. The Office of Hawaiian Affairs testified in opposition to this bill.

Your Committee finds that there was a tremendous amount of controversy over the constitutional convention

question that was placed on the ballot at the 1996 general election. There was disagreement over whether blank ballots and spoiled ballots, or ballots marked both "yes" and "no", should be counted in determining a majority on the convention question.

Lawsuits were filed in both state and federal courts on this issue. The Hawaii Supreme Court decided in March 1997, that blank ballots and spoiled ballots did count in determining the amount of ballots cast. As a result, the court held that the proposition failed.

The United States District Court for the District of Hawaii decided in July 1997, that, because the electorate was told prior to the 1996 election that blank ballots would not be counted for any purpose, the Hawaii Supreme Court's post-election decision rendered the election on the constitutional convention question fundamentally unfair. As a result, the Supreme Court held that the results of the constitutional convention question were void and that the State had to hold a new special election on this issue within sixty days. That decision was appealed to the United States Court of Appeals for the Ninth Circuit.

Your Committee concludes that because of the confusion over the constitutional convention question at the 1996 general election, the Legislature again should place this question on the ballot to be voted upon at the 1998 general election.

Your Committee, however, finds that section 3 of the bill may be misleading. This section provides that the proposal shall be considered only if approved by a majority of all "votes tallied upon the question." This language

differs from the language in Article XVII of the Hawaii Constitution, which requires a majority of all "ballots cast upon such a question."

Because of this potential ambiguity, your Committee finds that section 3 of this bill should be deleted. Your Committee has determined that deletion of this section would not affect the purpose of this bill.

Accordingly, your Committee has amended this bill by deleting section 3 of the bill. Your Committee further amended the bill by adding the word "state" in section 2.

As affirmed by the record of votes of the members of your Committee on Judiciary that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 3130, as amended herein, and recommends that it pass Second Reading in the form attached hereto as H.B. No. 3130, H.D. 1, and be placed on the calendar for Third Reading.

Respectfully submitted on
behalf of the members of the
Committee on Judiciary,

/s/ Terrance Tom
TERRANCE TOM, Chair

EXHIBIT 4

McCorriston Miho Miller Mukai
ATTORNEYS AT LAW

April 6, 1998

Senator Matthew Matsunaga
Senator Avery Chumbley
Co-Chairmen, Senate Judiciary Committee
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: Written Testimony of Mark J. Bennett regarding House Bill 3130 relating to a Constitutional Convention – April 9, 1998, 9:00 a.m.

Dear Senators Matsunaga and Chumbley:

I submit this written testimony in support of House Bill 3130, which provides that the voters shall have the opportunity in the 1998 general election, to vote on whether or not to hold a Constitutional Convention. Obviously one focus of the Committee's hearing will be whether there should be a new vote or not. I have also heard expressed the question of whether there is a need for a convention. I would respectfully suggest that the second question should be of much less importance, because if the circumstances make it appropriate to put the question back on the ballot, the need for a convention is what will be specifically addressed by the voters. If a majority of all of those going to the polls (which is a tough standard to meet) approve a convention, I think that in itself establishes the need. Nevertheless, I will address both issues in this testimony.

I belief that it is fair, just, and appropriate for the voters to have an opportunity in 1998 to vote on the convention question, because I do not think they had a fair opportunity to do so in 1996, nor do I think the election was fair. In this regard, I am joined by Duane [sic] Yoshina, head of the Office of Elections, who testified in the Con Con lawsuit (as set forth below), that because blank votes were counted as no votes, the election was unfair.

It is very important to lay out what I believe to be the undisputed facts regarding the election. First, it appeared absolutely clear prior to the election that blank ballots would not be counted in deciding the Con Con question. In *Republican Party of Hawaii v. Waihee*, 68 Haw. 258, 709 P.2d 980 (1985), the Supreme Court, in interpreting language in the City and County of Honolulu's Charter, very similar to the Con Con language in Article XVII of the Constitution, appeared to hold that blank ballots would never be counted in Hawaii elections, except with regard to the passage of constitutional amendments. As a result of this decision, Haw. Rev. Stat. § 11-151(3) was passed, providing that blank ballots do not count in Hawaii except with regard to ratification of constitutional amendments. Indeed, Haw. Rev. Stat. § 16-27 actually differentiates between a valid ballot and blank ballot. The Legislative Reference Bureau's 1968 and 1978 "Constitutional Convention Studies" specifically stated that in Hawaii, blank ballots do not count in determining whether or not a Con Con is approved. *Mr. Yoshina testified in his deposition that blank ballots had never been counted in determining whether the Con Con Questions have received a majority.* He testified that it was the historical practice of

the State "that in determining whether the Con question received a majority, blank ballots did not count as ballots cast." He testified that he thought the constitution clearly indicated this, and that prior to the election his office believed that was really "no question at all" – "it was clear." A Con Con fact sheet for public distribution specifically told the public that blank ballots would not count. This fact sheet is attached as Exhibit 1 to this testimony. The Office of Elections also put identical language on the Internet. A copy of this Internet information is attached as Exhibit 2. In addition, an information sheet available to the voters at every polling place told the voters that "yes" votes and "no" votes had meaning, but did not ascribe any meaning to a blank vote. In contrast, the same information sheets, with regard to constitutional amendments, stated exactly what the effect of blank votes was – essentially that they were "no" votes. Indeed, the office of the elections actually called up Citizens for a Constitutional Convention, the only organization campaigning in favor of a Con Con, and told them that they could not tell voters that blank ballots counted in determining a majority.

After the election, the Office of Elections was ready to certify the Con Con question as having passed, and the Attorney General issued a thorough opinion, stating that the question clearly passed. The Attorney General's opinion is attached as Exhibit 3. Perhaps most important to House Bill 3130, the Chief Elections Officer testified: *"It would have been impossible for voters to have known prior to the election that their blank ballots would count as ballots cast in determining whether or not there was a majority in favor of the Con Con question."* Mr. Yoshina also testified that: *"It is*

unfair to count the blank Con Con ballots as ballots cast when the voters were specifically told that the blank ballots would not count as ballots cast." Moreover, legal briefs which we submitted to various courts established that the Hawaii Supreme Court's decision in this matter was unprecedented, and that no other court had ever held that blank ballots counted in determining whether a proposition received the majority of ballots cast "upon a question." As the Committee knows, Judge Ezra agreed with our position, and found that the election was fundamentally unfair. As the Committee is also aware, the Ninth Circuit disagreed, but I believe that there is nothing in the Ninth Circuit's opinion which should lead the Committee to vote against House Bill 3130, and there is much in the opinion which would support the view that a new election ought to be held.

The Ninth Circuit noted that election "irregularities" do not rise to a federal violation "even if they control the outcome of the vote or election." The Ninth Circuit also held that in order for there to be a federal violation there had to be "significant disenfranchisement." The court noted that even if the Hawaii Supreme Court's decision "was wrong or contrary to general principles of election laws that did not raise a federal question. Perhaps the most telling statement in the Ninth Circuit's decision was that: "Hawaii used to interpret voter indifference as a reason neither for nor against amending the state constitution, but now interprets voter indifference as a reason not to convene a constitutional convention. This ex post clarification of the state's election laws" does not amount to federal violation. While this may be the case, an ex post facto change in the rules, which changes the results

of an election, give a very strong reason for allowing the voters a new election. While I disagree with the Ninth Circuit's view of federal law, there is nothing in the opinion which detracts from the proposition that it would have been impossible for any voter going to the polls to know that his turning in a blank ballot would count as a no vote, and there is nothing in the opinion which detracts from the proposition that the Hawaii Supreme Court changed the rules after the election.

The House unanimously decided that a new election was called for, with the rules known to all. Mr. Yoshina testified that the election was unfair, and that it would be fair if there were a new election in which the voters knew the blank vote rule in advance. We believe that it would be the height of cynicism to assert that the voters do not have the right to know in advance the meaning of their votes. If the Hawaii Supreme Court's retroactive rule change had resulted in a result detrimental to those who oppose the convention, they would be the first ones claiming that they should be entitled to a new fair election, when the rules are known by everyone in advance.

In court, the State conceded that it would have been impossible for a voter to have known the meaning of his blank ballot going into the polling booth, but claimed that that did not amount to a federal violation. The Ninth Circuit has agreed with the State, stating that this is a State issue. There are a great many people who believe that if the rules had been known in advance, election campaigns could have been tailored to address the issue, and to try to combat apathy, by letting voters know quite clearly that blank votes would count as no votes. To the extent that the voters are led astray as to the meaning of

their votes, an election cannot be said to be fundamentally fair. While the Supreme Court's changing the vote counting rules cannot be rectified by the Legislature, the unfairness of the process by which people did not know the rules can be rectified, by the relatively simply expedient of putting the question back on the 1998 general election ballot. It will cost very little, and while, as stated above, it will be difficult for the proponents to prevail, at least everyone will know the rules in advance. *I would ask the committee members to consider one additional question when deciding how to vote on this issue. If the election circumstances described above had resulted in the defeat of something that they cared passionately about, would not they want a new fair election on that issue.*

I truly believe that the question of whether Hawaii needs a Constitutional Convention is not germane to the issue of whether this question should be put back on the 1998 ballot. The need for a convention is an issue up to the people. I think that is why both newspapers have stated in editorials that even though they might not see a great need for a convention, there ought to be a new fair election, with people knowing all the rules in advance. However, there are a great many issues that could be taken up by a convention. The issues of initiative, referendum and recall, which have never been presented to the people of Hawaii for a vote, could be considered. The victims of crime bill of rights, a part of which was recently considered by this Committee, could be considered. In fact, in holding the bill, the Committee stated that this would be an issue which it believed could very well be taken up by a convention, if the voters approved

one. Issues relating to Hawaii's economy and tax structure could be taken up by a convention. Issues relating to the school board could be taken up by a convention. Issues relating to State/County relationships and Home Rule could be considered. And, issues relating to a great many other matters could be taken up by a convention, and there are many people with many interests far beyond my own who could raise many issues that they feel should be considered by a convention.

Regardless, however, there has been no convention since 1978. The people should have a fair opportunity to decide whether to have a convention, with everyone knowing the rules in advance. I strongly urge you to vote for House Bill 3130.

Very truly yours,

/s/ Mark J. Bennett
Mark J. Bennett

MJB:ae
Enclosures

EXHIBIT 5

STAND. COM. REP. NO. 3283

Honolulu, Hawaii
APR 9, 1998

RE: H.B. No. 3130
H.D. 1
S.D. 1

Honorable Norman Mizuguchi
President of the Senate
Nineteenth State Legislature
Regular Session of 1998
State of Hawaii

Your Committee on Judiciary, to which was referred H.B. No. 3130, H.D. 1, entitled:

"A BILL FOR AN ACT RELATING TO A CONSTITUTIONAL CONVENTION"

begs leave to report as follows:

The purpose of this bill is to place on the 1998 election ballot the question of whether there shall be a convention to propose a revision or amendments to the Constitution.

Your Committee finds that there has been an immense amount of controversy surrounding the results of the vote on the constitutional convention question that was placed on the 1996 general election ballot. Your Committee further finds that the controversy was focussed [sic] on whether blank and spoiled ballots should be counted in determining a majority on the convention question.

Therefore, because of this controversy and the ensuing debate regarding placing the question before the voters at the next general election, your Committee is choosing to exercise the power granted in Article XVII, section 2 of our state constitution, which allows the legislature to submit to the electorate at any general election the question regarding the convening of a constitutional convention. Your Committee further finds that by exercising this power, the legislature will restore the peoples' trust in the electoral process and resolve any remaining issues regarding the peoples' right to a fair election that some citizens feel was compromised in the 1996 election.

Testimony in support of this bill was submitted by: Let the People Decide; the National Federation of Independent Business; the Citizens for a Constitutional Convention; and ten private citizens.

Testimony in opposition to this bill was submitted by: the Office of Hawaiian Affairs; American Civil Liberties Union of Hawaii; Hawaii Women's Political Caucus; Native Hawaiian Legal Corporation; Hawaii Women Lawyers; Hawaii State Teachers Association; University of Hawaii Professional Assembly; International Longshoremen's and Warehousemen's Union Local 142; United Food and Commercial Workers Union, Japanese American Citizens League; American Friends Service Committee; Marriage Project – Hawaii; Hawaii Government Employees Association; Hawaii State AFL-CIO; and fourteen private citizens.

The Office of Elections, Sierra Club, and League of Women Voters of Hawaii submitted comments on this bill.

Upon further consideration, your Committee has amended the bill by making non-substantive changes to conform with proper drafting style.

As affirmed by the record of votes of the members of your Committee on Judiciary that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 3130, H.D. 1, as amended herein, and recommends that it pass Second Reading in the form attached hereto as H.B. No. 3130, H.D. 1, S.D. 1, and be placed on the calendar for Third Reading.

Respectfully submitted on
behalf of the members of the
Committee on Judiciary,

/s/ Avery B. Chumbley
AVERY B. CHUMBLEY,
Co-Chair

/s/ Matt Matsunaga
MATTHEW M.
MATSUNAGA, Co-Chair

[MATERIAL DELETED]

H.B. NO. 3130
H.D. 1
S.D. 1

HOUSE OF REPRESENTATIVES
NINETEENTH LEGISLATURE, 1998
STATE OF HAWAII

A BILL FOR AN ACT

RELATING TO A CONSTITUTIONAL CONVENTION

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Article XVII, section 2, of the Constitution of the State of Hawaii provides that the Legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" The purpose of this Act is to provide for the submission of such question to be placed on the ballot at the general election of 1998.

SECTION 2. The Legislature hereby submits the question to be placed on the ballot as follows:

> "Shall there be a convention to propose a revision of or amendments to the Constitution?"

SECTION 3. This Act shall take effect upon its approval.

EXHIBIT 6

McCORRISTON MIHO MILLER MUKAI
ATTORNEYS AT LAW

April 21, 1998

Representative Terrance W.H. Tom
Chairman, House Judiciary Committee
State Capitol
Honolulu, Hawaii 96813

Via Facsimile: 586-6501

Re: House Bill 3130 Relating to the Constitutional Convention

Dear Representative Tom:

I am writing to you concerning House Bill 3130, relating to placing the constitutional convention question on the ballot in 1998. I wish to thank you again for insuring passage of this measure in the House, based upon your view that it is the fair thing to do. This letter specifically concerns the differences between House Draft 1 and the Senate Draft on this Bill. None of the changes in the Senate Draft go to substance, and in fact seem to just be a difference in "style." I would ask if the House could simply agree to the Senate version, and avoid the need for a conference committee, because the changes are so minor.

There was initially in Senate Draft 1 a significant and major change, in that contrary to the House Bill, the Senate Draft did *not* provide for the Bill to go to the Governor. This could have created enormous problems. In both written and oral testimony I suggested to the Senate Judiciary Committee that the House Draft was correct, and the Bill should be written as the house Draft

was, with regard to this one substantive matter. Ultimately Senators Matsunaga and Chumbley agreed, and conformed the Bill to the House Draft on this important substantive respect.

Thus, with regard to the only substantive change the Senate proposed to make, it dropped that change, and conformed to the House version.

Again, thank you for your work with regard to this Bill, and I would respectfully ask that House if it could agree to the Senate Draft, to avoid a conference committee, because the only changes in the Senate Draft are non-substantive "style" changes.

Very truly yours,

/s/ Mark J. Bennett
Mark J. Bennett

EXHIBIT 7

HOUSE OF REPRESENTATIVES
THE NINETEENTH LEGISLATURE

[SEAL]

STATE OF HAWAII
STATE CAPITAL
HONOLULU, HAWAII 96813

April 29, 1998

The Honorable Benjamin J. Cayetano
Governor
State of Hawaii
State Capitol
Honolulu, Hawaii 96813

Re: H.B. No. 3130 HD1 SD1

Sir:

I have the honor to transmit herewith the above-entitled Bill which passed Final Reading in the House of Representatives on April 29, 1998 and Third Reading in the Senate on April 14, 1998 of the Nineteenth Legislature of the State of Hawaii, Regular Session of 1998.

Respectfully,

/s/ Patricia Mau-Shimizu
Patricia Mau-Shimizu
Chief Clerk
House of Representatives

Records Division – Office of the Chief Clerk

House of Representatives
State Capitol, Room 027 Telephone: 586-6400
Honolulu, Hawaii 96813 FAX: 586-6401

Transmittal Memorandum

DATE:

TO: THE HONORABLE BENJAMIN J. CAYETANO
GOVERNOR
EXECUTIVE CHAMBERS – 5TH FLOOR

FROM: Records Division
Office of the Chief Clerk
RECEIVED GOVERNOR'S OFFICE
'98 MAY 1 AM 8 51

The following are being transmitted:

HB No.3130HD1 SD1 original and
five copies

Received by: /s/ Illegible
Date: _____

If there are any questions, please call Yvonne at (808) 586-6577

EXHIBIT 8

[MATERIAL DELETED IN PRINTING]

The Honolulu Advertiser, Sunday, June 28, 1998

Voters to decide on convention

Associated Press

Gov. Ben Cayetano has signed a measure into law under which voters will decide in November whether a state constitutional convention should be held.

"While arguments are good on both sides, this issue should be decided at the polls by the voters," Cayetano said last week.

A 1996 vote ended in a legal dispute. More than 45,000 blank ballots were counted as "no" votes, and the issues was defeated.

A federal judge later ordered a new vote but the 9th U.S. Circuit Court of Appeals eventually upheld the state's original election results.

State lawmakers decided this year that a second vote would clear up any confusion over where voters stand on the issue.

Earlier this month, a new community group called Protect Our Constitution began campaigning against a constitutional convention.

EXHIBIT 9

Wednesday, April 29, 1998 Star-Bulletin,

Con Con question one step away from ballot

Star-Bulletin staff

You will get another chance to decide whether the state should have a constitutional convention if the governor signs the bill.

The House yesterday passed the measure to put the question on the November ballot when it voted to agree with the Senate's version of the bill.

There were slightly more yes votes than no votes to have a Con Con when the question was on the 1996 ballot.

But the state Supreme Court ruled that blank and spoiled ballots would count as no votes and the measure failed.

The governor has said he is opposed to a Con Con but has also said he would not veto the bill.

The Legislature has the power under the state Constitution to call for the question, but it is sending the bill for the governor's signature because the Constitution is not clear on whether the governor's approval is needed.

[OTHER EXHIBITS AND DECLARATIONS DELETED]

APPENDIX Q

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, JERRY BECK, LET THE PEOPLE DECIDE, AND CITIZENS FOR A CONSTITUTIONAL CONVENTION, ON BEHALF OF THEMSELVES, AND OTHERS SIMILARLY SITUATED, Plaintiffs-Appellees, vs. DWAYNE D. YOSHINA, CHIEF ELECTIONS OFFICER OF THE STATE OF HAWAII; OFFICE OF ELECTIONS; MAZIE K. HIRONO, LIEUTENANT GOVERNOR OF THE STATE OF HAWAII; AND BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII, IN THEIR OFFICIAL CAPACITIES, Defendants-Appellees,	APPEAL NO. 97-16408 and 97-16543 (D. Haw. Civ. No. 97-00322 DAE) [Filed Aug. 6, 1998]

OPPOSITION OF DEFENDANTS-APPELLANTS TO PLAINTIFFS-APPELLEES' SUGGESTTON OF PARTIAL MOOTNESS (AND FOR OTHER RELIEF)

AFFIDAVIT OF COUNSEL

EXHIBITS A-E

CERTIFICATE OF SERVICE

MARGERY S. BRONSTER
Attorney General of Hawaii
DOROTHY SELLERS
GIRARD D. LAU
Deputy Attorneys General
Department of the Attorney General
425 Queen Street – 2nd Floor
Honolulu, Hawaii 96813
Telephone (808) 586-1387

Counsel for Appellants

August 5, 1998

[Material Deleted]

SUMMARY

Bennett's cumbersomely-titled and convoluted motion should be denied entirely and without further ado for three lucid, straightforward reasons.[1] First, this court has issued its mandate, and nothing in Bennett's

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[1] Defendants-appellants are the Governor, Lieutenant Governor, Chief Election Officer, and Office of Elections of Hawaii. Plaintiffs-appellees are Hawaii voters and election-issue organizations. Consistent with this court's opinion on the merits filed March 27 and amended June 23, 1998 ("the Opinion"), the parties may be referred to as, respectively, "Yoshina" and "Bennett," and the decision of the Hawaii Supreme Court in *Hawaii State AFL-CIO v. Yoshina*, 935 P.2d 89 (Haw. 1997) may be referred to as *"Yoshina I."*

motion either overcomes the strong policy of ending litigation or supports the drastic step of recalling the mandate. Second, the claim for attorneys' fees falls far outside all known boundaries of the catalyst theory of fee recovery. Third, the request to vacate the opinion is meritless because (a) the case is not moot because the 1998 legislation (Act 131) did not completely and irrevocably eradicate the effects of the alleged violation of due process in 1996, and (b) Bennett acquiesced in the alleged mooting event, the passage of Act 131 in 1998.

BACKGROUND

The November 1996 general election in Hawaii included a ballot question on whether a constitutional convention should be convened. The question was included pursuant to the *second sentence* of Article XVII, Section 2 of the Hawaii Constitution (Ex. A), providing that the convention question must be submitted to the voters no less frequently than every ten years at a general election.

The 1996 vote on the convention question was sufficiently close that, unprecedently, the blank ballots controlled the outcome. The Attorney General issued an opinion two weeks after the election that the blank ballots were not included in the vote count and that the constitutional convention question had been approved. Four months after the election, the Hawaii Supreme Court in an original adversary proceeding held that the blank ballots were included in the vote count and ordered Yoshina to certify that the constitutional convention question had failed (*Yoshina I*). Yoshina so certified.

Plaintiff filed suit in federal court in April 1997. The primary theory of the complaint was that *Yoshina I* was such an unforeseeably unfair interpretation of Hawaii's election laws as to effect a denial of due process. The complaint sought the relief of eradicating the result of the 1996 election and the holding of *Yoshina I* as applied to the 1996 election, either by certifying (precisely contrary to the certification effected by *Yoshina I*) that the constitutional convention question had been approved in November *1996* or by requiring an immediate special election to re-vote (and substitute for) the November *1996* vote on the constitutional convention question.

Yoshina defended primarily on the ground that there was no due process violation and no basis for federal intervention in the State of Hawaii's election affairs.

On cross Motions for summary judgment, the district court ruled in July 1997 in favor of Bennett and ordered Yoshina to run a special election – later ordered for December 6, 1997 – to re-vote the convention question. Yoshina appealed (No. 97-16408). and Bennett cross appealed (No. 97-16543). The theory of the cross appeal was that the district court, rather than ordering a new election, should have ordered the convention question certified as approved at the 1996 general election.

This court stayed the district court's order (Order Sept. 10, 1997) and expedited the appeals. The court heard argument on January 16, 1998 and issued its opinion an March 27, 1998. The Opinion entirely reversed the summary judgment in favor of Bennett, remanded with instructions to enter judgment in favor of Yoshina, and awarded costs to Yoshina.

Plaintiffs sought rehearing and rehearing en banc. This court denied such relief on June 23, 1998. The judgment is dated July 1, 1998.

The Hawaii Legislature convened on January 21, 1998. The *first sentence* of Article XVII, Section 2 of the Hawaii Constitution provides that, "the legislature may submit to the electorate at *any general or special election* the question, 'shall there be a convention to propose a revision of or amendments to the Constitution?' " (emphasis added) (Ex. A). Acting pursuant to this sentence, the Legislature passed H.B. 3130, H.D. 1, S.D. 1 (H.B. 3130) to submit the constitutional convention question on the November 1998 general election ballot.

The Governor approved the bill – now Act 131 – on *June 22, 1298* (Exs. B, C). The date the Governor approves a bill is of course a matter of public record.[2]

CHRONOLOGY

To assist the court, here is a chronology of all events, including 1998 legislative events, relevant to Bennett's claim of prevailing party status. Ninth Circuit actions are in boldface.

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[2] Bennett's motion inexplicably and repetitively relies on a incorrect date – June 26, 1998 – by reference to news clippings that do not reflect the date of approval (Mot. at 2; Mem. at 1, 2, 5, 9, 26, 27; Ex. 8).

1996

November 5	General Election Day
November 19	Attorney General Opinion – constitutional convention approved
November 25	Complaint filed in *Yoshina I*

1997

January 24	Last day for bill introductions in 1997 Legislature (Ex. D)
March 24	Hawaii Supreme Court decides *Yoshina I* – constitutional convention question rejected
April 15	Bennett files complaint in federal district court
May 1	Hawaii Legislature adjourns
July 11	Federal district court enters judgment for Bennett requiring special election
July 15	Yoshina appeals
July 29	District court extends deadline for special election to December 6, 1997
August 11	Bennett cross appeals
September 10	**Ninth Circuit grants stay of special election and expedites appeal**
December 23	**Ninth Circuit strikes Bennett's cross-appeal "reply" brief for violation of Fed. R. App. P. 28(c)**

1998

January 16	**Ninth Circuit hears argument in San Francisco**
January 21	Hawaii Legislature convenes for 1998 session
January 28	H.B. 3130 introduced in House of Representatives (Pls. Ex. 1)
February 20	H.B. 3130 passes third House reading and transmitted to Senate (Ex. C)
March 27	**Ninth Circuit issues Opinion – Bennett loses**
April 10	**Bennett petition Ninth Circuit for rehearing and rehearing en banc**
April 14	H.B. 3130 passes third Senate reading as amended (Ex. C)
April 29	House agrees to Senate amendments (Ex. C)
May 1	H.B. 3130 transmitted to Governor (Ex. C)
June 22	Governor approves H.B. 3130 (Act 131) (Exs. B, C)
June 23	**Ninth Circuit non-substantively amends Opinion and denies rehearing**

THERE IS NO BASIS FOR RECALLING THE MANDATE

The judgment and mandate of this court have issued, including the ruling that, "Yoshina shall recover his costs

on appeal from Bennett." (Slip Op. at 6305). Certiorari lies to the Supreme Court.

The relief Bennett seeks in his present motion is all premised on the theory that this court should exercise its inherent authority to recall the mandate. Mandates are recalled rarely and only for the most compelling reasons:

> Recall of the mandate "is an extraordinary remedy which is only granted in cases where it is necessary to serve the interest of justice." . . . The decision whether to grant this remedy rests entirely within this court's discretion. . . . We use our power to grant this remedy sparingly, in recognition of the rule that "[t]here must be special reason, 'exceptional circumstances,' in order to override the strong policy of repose, that there be an end to litigation."

United States v. Feldman, 830 F.2d 134, 135 (9th Cir. 1987) (citations omitted).

Here, there is no reason to recall the mandate. No injustice has occurred, much less an injustice requiring the exceedingly rare and extraordinary step of recalling the mandate. Rather, as set forth below, Bennett is not the prevailing party and the case is not moot.

BENNETT IS NOT THE PREVAILING PARTY

A. Introduction

Bennett lost everything that he could conceivably lose on appeal to Yoshina. Bennett lost Yoshina's motion for stay pending appeal, thereby losing the December 1997 special election ordered by the district court. Bennett lost Yoshina's motion to strike the cross appeal "reply"

brief. Bennett lost on the merits of Yoshina's appeal (and so lost that the court did not need even to address the cross appeal). Finally, Bennett lost on his requests for rehearing and rehearing en banc.

Bennett's defeat on appeal was absolute, uninterrupted, and total. Now he asks this court for attorneys' fees for appeal on the theory that his unsuccessful lawsuit was a catalyst for Act 131, and that therefore he qualifies as a prevailing party under 42 U.S.C. § 1988(b).[3]

---

[3] Bennett also fleetingly attempts to arrogate unto himself prevailing party status with the assertion that Act 131 "sharply and materially" altered the legal relationship of the parties (Mem. at 2). The *law* is that a material alteration of the legal relationship between parties occurs *only* when the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant. *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1011 (9th Cir. 1995) (quoting *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). Bennett obtained none of these.

Moreover, the notion that Act 131, if not complied with, confers enforcement rights on Bennett makes no sense. His enforcement rights would be no greater than those of any other citizen, and this would be true not only as to Act 131 but as to any other enactment requiring compelled compliance.

The Ninth Circuit does not interpret *Farrar* as precluding a catalyst theory of fee recovery in appropriate circumstances. *Kilgour*, 53 F.3d at 1010. As reported as *Kilgour*, there is a split between the Fourth and the Ninth (and numerous other) circuits on this issue. 53 F.3d at 1010.

Because the Supreme Court seems not to have addressed the issue, and because of Bennett's repeated and not-so-veiled threat that, if he does not get his way on this fee motion, he will seek Supreme Court review (Mot. at 3; Mem, at 3, 13, 18, 20, 44, 46), Yoshina interposes here the argument that the catalyst theory of fee recovery did not survive *Farrar*.

The catalyst concept cannot apply to a fee request in the face of a totally adverse litigation outcome and when the relief was obtained from non-defendants not acting under any legal compulsion and was obtained by pursuing a separate path of relief that was independently available both before and after the lawsuit.

And, because the prevailing party question may be denied without resolution of factual issues, it is not necessary either to recall the mandate or to transfer the case to the district court for consideration of the fee issue. As this court stated in *California Ass'n of the Physically Handicapped, Inc. v. Federal Communications Comm'n*, 721 F.2d 667, 671 (9th Cir. 1983) (CAPH), *cert. denied*, 469 U.S. 832 (1984), "Although we would ordinarily remand the case to the District Court for a determination of the attorneys' fees issue, we need not remand where resolution of factual issues is unnecessary." (citation omitted). In *CAPH*, the court determined that the remand was "unnecessary" because *CAPH* could not legally qualify as a prevailing party. Id. That reasoning controls here. There is no need to set sail on a "second major litigation" about attorneys' fees contrary to the teaching of *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

B. Act 131 Was Gratuitous And Not Required By Law

To qualify as a catalytic prevailing party, Bennett must prove both that: (1) there is a clear, *causal relationship* between the litigation brought and the allegedly favorable action taken by the litigation defendant; and (2) the allegedly favorable action on which the catalyst claim

is premised was required by law. *See e.g. Sablan v. Director of Finance*, 856 F.2d 1317, 1324-25 (9th Cir. 1988).

It is efficient to start the discussion of why Bennett fails *both* prongs of the inquiry with the shorter discussion of the second prong failure.

The second prong of this court's catalyst analysis traces back to *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978):

> if it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interest, *is not required by law*, then defendants must be held to have acted *gratuitously* and plaintiffs have not prevailed in a legal sense.

(emphasis added) (cited in *CAPH*, 721 F.2d at 672 and *Sablan*, 856 F.2d at 1327).

As *Sablan* elaborated,

> Stated otherwise, "the defendant's conduct in response to the lawsuit must be required by law," . . . to ensure that the government did not act "gratuitously in response to a frivolous or legally insignificant claim."

Sablan, 856 F.2d at 1325 (citations omitted). See also *CAPH*, 721 F.2d at 672 (a plaintiff cannot be a prevailing party where a defendant's action is only gratuitous.)

Here, Act 131 was gratuitous because, both when it passed the Legislature and when it was approved by the Governor, this court had already judicially determined that no re-submission of the constitutional convention question was legally necessary (at least until 2006, the

next ten-year election). *The Opinion was the law.* Act 131 was not required by law, because this court had already ruled that no election was required.

Neither the fact that Bennett's longshot rehearing petition was pending when the Legislature passed and the Governor approved H.B. 3130 nor the fact of Bennett's repeated threat to seek Supreme Court review can alter the import of the Opinion as a *judicial determination* that submitting the constitutional convention question at the November 1998 general election, however beneficial that may be to Bennett's interest, was *not required by law.*[4]

And, because Bennett has failed the second prong of the catalyst inquiry, there is no need for the court to consider the first prong, which Bennett likewise fails.[5]

---

[4] These matters reflect only that Bennett continues to litigate after his action "clearly became" groundless. *Nadeau v. Helgemoe,* 581 F.2d at 281 (quoting the discussion in *Christianburg Garment Co. v. E.E.O.C.,* 434 U.S. 412, 422 (1978) on when attorney fees may be assessed against a *plaintiff).*

[5] Given the gratuitous nature of the enactment of Act 131, this court need not decide whether Bennett's case was frivolous, unreasonable, or groundless when it was filed (although Bennett's core due process argument was rejected as "beyond belief"). (Slip Op. at 6303)).

Bennett's contention (Mem. at 23) that his case was substantial because this court granted extended argument time and issued a "lengthy" opinion is preposterous. The appeal time was "extended" 10 minutes to accommodate the related intervention appeals. The time for the merits argument remained at the normal 20 minutes (Order Dec. 23, 1997). Bennett's present motion, by itself, disproves any correlation between length and meritoriousness.

C. Bennett's Unsuccessful Lawsuit Was Not The Catalyst For Act 131

Returning – we believe unnecessarily – to the first prong of the catalyst theory, this court has explained;

> However, even in the absence of a favorable judgment, a litigant may be a prevailing party for purposes of an attorney fee award if his action was a "catalyst" which *motivated* the *defendant* to provide the *relief originally sought* through litigation.

Beach v. Smith, 743 F.2d 1303, 1306 (9th Cir. 1984) (emphasis added) (citing *American Constitutional Party v. Munro*, 650 F.2d 184, 187 (9th Cir. 1981)).

Thus, to prove the required causal link between his lawsuit and Act 131, Bennett must prove that his lawsuit (1) *motivated;* (2) the *lawsuit defendant* to provide; (3) the *relief originally sought* through litigation. Bennett has proved none of these three factors.

1. Clear Causal Relationship

The pebbles of "proof" that Bennett adduces in support of his catalyst claim lack probative value. (1) Bennett contends that Act 131 was the result of litigation "pressure" from his lawsuit (Mem. at 1, 20). But the *fact* is that this court's Opinion issued March 27, 1998.[6] This was *before* H.B. 3130 was either passed by the Legislature on April 29 or approved by the Governor on June 22, 1998.

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[6] Bennett's five-page "historical accounting" (Hem. at 18) contains one oblique reference (at 17) to this court's Opinion.

In a typical catalyst situation, the litigation defendant confers all or a portion of the requested relief (even without a formal judgment, consent decree, or settlement), based upon a reasoned assessment of the applicable law and of the probable litigation outcome and damages, including exposure to liability for attorneys fees. When this court issued its Opinion in *favor* of Yoshina, any prior litigation pressure evaporated. At that point, the possibilities of rehearing by the unanimous panel or en banc or of Supreme Court review and reversal could reasonably be assessed as remote indeed.[7] A favorable ruling from a federal court of appeals is a significant legal event, and the party receiving the favorable ruling would surely be *less* motivated after the ruling than before to accede to any litigation demands of an opponent.

(2) *Yoshina I*, requiring the 1996 submission of the constitutional convention question to be certified as rejected, and following an opinion of the Attorney General that the question should be certified as approved, did create confusion and controversy. The Hawaii Legislature disagreed with the decision of the Hawaii Supreme Court in *Yoshina I* and reacted against it at the first opportunity.[8]

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[7] There is no reason that the Governor, in approving Act 131, would even be aware of such an ordinary, commonplace event in the department of attorney general as an unsuccessful litigant seeking rehearing.

[8] The last day for introducing bills in the 1997 Hawaii Legislature was January 24, 1997 (Ex. D). *Yoshina I* was decided two months later, when the 1997 Legislature was on the homestretch to its May 1 adjournment.

Bennett now asserts that his lawsuit *"generated"* the controversy and confusion that the Legislature acted to resolve. (Mem. at 15; see also Mem, at 3, 16, 18, 19, 21, 23). The House Report contains one reference to the federal lawsuit (Pls. Ex. 3 at 1). That single reference does not in any way suggest that the lawsuit *created* the controversy and confusion. The Senate Report (Pls. Ex. 5) dated after this court's Opinion issued does not say one word about the lawsuit.

Contrary to Bennett's bald assertion, his federal lawsuit did not generate controversy and confusion. The controversy and confusion pre-existed the lawsuit and arose from the unlikely 1996 election result, with its unprecedented controlling bloc of blank ballots, and from the Hawaii Supreme Court's decision in *Yoshina I*. The confusion and controversy generated Bennett's lawsuit, not the other way around.

(3) Bennett claims that the unsuccessful lawsuit allowed him to present to the Legislature testimony that would not otherwise have been available. (Mem. at 14). To support this claim, Bennett quotes at length his own testimony to the House about the alleged unfairness of voters not knowing the election ground rules, and about the Fact Sheet, internet posting, and alleged opinions of Chief Election Officer Yoshina. (Mem. at 14-15).[9] There is no

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[9] Bennett wrote the House Committee that Yoshina had testified at deposition in the lawsuit that "it would be more fair to have a new election." (Pls. Ex. 2 at 1). No page cite was included. None could be. The entire Yoshina deposition was included in record in this case (CR 8 [Pls. Mot. S.J.] Ex. 5). Yoshina gave no such deposition testimony.

showing that the federal lawsuit was necessary to Bennett's ability to obtain any of this information or make any of these arguments to the Legislature, and there is no evidence that they influenced the Legislature.

Bennett likewise quotes at length from his testimony to the Senate following this court's Opinion. The key point he cites from the Opinion – that "Hawaii used to interpret voter indifference neither for nor against amending the state constitution, but now interprets voter indifference as a reason not to convene a constitutional convention" (Slip. Op. at 6303) – was a fact based on the decision in *Yoshina I* and could have been made to the Senate Committee without need of a federal lawsuit.

(4) Bennett erroneously informs this court that Dwayne Yoshina, as Chief Election Officer and representative of the Office of Elections, testified in favor of H.B. 3130, "the curative legislation." (Mem. at 3). Yoshina did no such thing. Exhibit E contains his at least noncommittal and perhaps somewhat negative testimony before both the House and Senate on H.B. 3130.[10]

(5) There is no support for or consequence to Bennett's contention that no one in state government took any action to remedy the "unfairness" of *Yoshina I* until after Bennett filed his federal lawsuit. (Mem. at 7, 13-14, 21).

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[10] Bennett restates his erroneous proposition that Yoshina testified in favor of H.B. 3130 with the introduction, "(A)ccording to the House Committee Report. . . . " (Mem. at 16). This careful wording suggests that Bennett *knows* the Committee Report is wrong but does not want this court to know.

First, this court has *rejected* the due process claim of "unfairness."

Second, as previously discussed, *Yoshina I* was decided too late in the 1997 legislative session for responsive action. Thus, absent a special session, the Legislative could not act on *Yoshina I* until the 1998 legislative session, which was necessarily after Bennett filed his lawsuit.

Third, there is no basis for the criticisms that the Attorney General *should have* sought reconsideration of the unanimous decision of the five-member Hawaii Supreme Court in *Yoshina I* or *should have* sought review by the United States Supreme Court Of an interpretation of the Hawaii Constitution by the highest court in Hawaii in a case not addressing a federal constitutional question (Mem. at 14). These "should-have's" reflect the mindset that every lawsuit must be taken to its most prolonged, expensive, and bitter ending.

Finally, even if Bennett were correct in his hindsight about all that the Attorney General failed to accomplish, that would not advance *his* claim about what *his* lawsuit actually did accomplish.

(6) Bennett's suggestion that the Governor signed H.B. 3130 into law to "stop the clock" on further fee liability is pure speculation. If the Governor were motivated to "stop the clock," he would have signed on May 1, when the bill was transmitted to him (Ex. C), rather than seven weeks later on June 22, 1998. And certainly the Governor should be allowed to not wait until the last day before signing without having his motives impugned.

(7) Bennett argues that the submission of the constitutional convention question in November 1998 under Act 131 "comes no later" than would have occurred *if* Bennett had prevailed in this court (Mem. at 13). This "what if" speculation adds nothing to Bennett's catalyst claim. Indeed, Bennett's speculation misses the point: the legislative relief comes no earlier than if Bennett had *never filed* his lawsuit.

(8) Bennett's lengthly attempt to distinguish *American Constitutional Party v. Munro*, 650 F.2d 184 (9th Cir. 1981) (ACP) is unavailing. Bennett contends that because plaintiffs in *ACP* lost in the federal district court, "there was never the sort of litigation pressure that attended this case, where Defendants, as a result of the Plaintiffs' victory in the District Court, bore the risks of proceeding as appellants in the federal judicial system." (Mem. at 20). As long as the suit initiated by ACP was not frivolous, it would necessarily impose litigation risks. Yoshina bore the same risks of proceeding as a party in the federal appellate system, whether as appellant or appellee. Losing on appeal in *either* capacity would mean additional fee and cost liability.

What the catalyst claim comes down to, then, is that the House Report refers one time to Bennett's lawsuit in the sentence, "Lawsuits were filed in both state and federal courts on this issue." *This* one vague statement does not show a clear causal relationship between the lawsuit and the passage of H.B. 3130.

Finally, while it may be possible to achieve catalytic prevailing party status "even in the absence of a favorable judgment," *Beach v. Smith*, 743 F.2d at 1306, no court

has held that a litigant may be a prevailing party in the *presence* of a totally adverse litigation outcome. To those Hawaii citizens under the impression that the 1996 vote on the constitutional convention question was unfair or that *Yoshina I* was a maverick decision, H.B. 3130 would have been unnecessary if Bennett had succeeded in his federal action. H.B. 3130 was "necessary" only because of Bennett's total litigation failure. Bennett is illogically saying that he is entitled to attorneys' fees without regard to the failure of his case, under the ruse of "heads I win, tails you lose."

2. "Relief" From Non-defendants

A lawsuit is a catalyst if it motivates the *defendant* to provide the relief originally sought through litigation. *Beach*, 743 F.2d at 1306 (emphasis added). The focus is on "the *defendant's* conduct in response to the lawsuit. . . ." and the lawsuit plaintiff must show that the lawsuit "prompted *defendants* to take action," *Sablan*, 856 F.2d at 1325 (9th Cir. 1988) (emphases added) (citations omitted).

Here, there is no showing that Act 131 resulted from action by the four litigation *defendants* – Governor Cayetano, Lieutenant Governor Hirono, Chief Election Officer Yoshina, and the Office of Elections.

The *Legislature* – not a lawsuit defendant – passed H.B. 3130. There is no evidence that any of the lawsuit defendants contributed to the Legislature's action. As noted, Yoshina did not testify in favor of H.B. 3130. No

one from the executive branch took any position on H.B. 3130, much less supported it.[11]

Governor Cayetano approved H.B. 3130. He was a lawsuit defendant only in his official capacity as "the official whose duty it is to call for a new election if so ordered by the court" (CR 7 (Am. Compl.) at 3 ¶ 8. This language of the complaint is taken from Hawaii Revised Statutes § 11-174.5 (Ex. A), dealing with original proceeding election contests in the Hawaii Supreme Court. The Governor was *not* a lawsuit defendant in his capacity as the chief executive whose duty it is to approve or veto bills under Article III, Section 16 of the Hawaii Constitution (Ex. A).[12]

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[11] Bennett's *lawsuit* was vigorously defended because of the lack of any legal basis for federal court overthrow of a state court election. It is one thing to have a "family" dispute about a Hawaii election or a Hawaii Supreme Court decision; it is another thing altogether to send out for the federal judiciary to resolve the dispute.

[12] As Bennett has previously advised this court (Mot. Stay [May 4, 1998] at 1 n.1), it is an open constitutional question in Hawaii whether the Governor's Article III, Section 16 approval/veto power even applies to the legislative power under the first sentence of Article XVII, Section 2 to "submit to the electorate at any general or special election" the constitutional convention question.

The first Senate draft of H.B. 3130 omitted the "take effect on approval" section (Pls. Ex. 6). There was no Executive Branch versus Legislative Branch impasse because the Legislature ultimately did submit H.B. 3130 to the Governor for approval and the Governor did approve. But someday there may be a parting of the ways on this issue, and the Hawaii Supreme Court may decide whether gubernatorial approval is required.

In short, the legislative relief was neither provided by the lawsuit defendants nor motivated by the lawsuit, which had been decided both when the Legislature passed and the Governor approved H.B. 3130.

3. Different Relief

The catalyst theory requires the litigation plaintiff to prove that defendant was motivated by the lawsuit "to provide the relief originally sought through the litigation." *Beach*, 743 F.2d at 1306 (citing *American Constitutional Party v. Munro*, 650 F.2d 184, 187 (9th Cir. 1981).

Article XVII, Section 2 of the Hawaii Constitution (Ex. A) provides two different paths for submitting the constitutional convention question to the electorate:

> Section 2. The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" If any nine-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period.

Under the first path the *Legislature* may submit the question as often as it pleases, even annually or more frequently, by special election. This provision, by itself, negates Bennett's claim that Act 131 confers on Hawaii citizens an all new "right to vote upon whether to hold a

constitutional convention only two years after the preceding vote on that issue." (Mem. at 1). The Hawaii Constitution conferred that right forty years ago. Bennett's claimed accomplishment is wholly illusory.

Under the second path, the constitutional convention question must be automatically submitted to the electorate no less frequently than every ten years at a general election.

The election at issue in *Yoshina I* and in this federal lawsuit was the second path, automatic ten-year election. Bennett of course did not need a federal lawsuit to ask the Legislature to submit the question under the first path. Yoshina so noted a year ago in the motion for stay pending appeal:

> [I]f this court grants a stay pending appeal of the district court order requiring a re-vote on the constitutional convention question, the stay will not prevent plaintiffs and all others favoring a constitutional convention from lobbying the Hawaii Legislature to submit the question to the voters in an immediate special election, without regard to the outcome of this litigation.

(Stay Mot. [Aug. 15, 1997] at 32 n. 18).

The optional legislative trip in 1998 down the first path does not entitle Bennett to attorneys' fees for unsuccessfully litigating the necessity of relief under the second path. See *Rock Creek Ltd. Partnership v. State Water Resources Control Bd.*, 972 F.2d 274, 279-80 (9th Cir. 1992), *cert. denied*, 508 U.S. 949 (1993) (approach to FERC was independent avenue and not a condition precedent to

partially successful federal court action; fees allowable, if at all, only for litigation success).

The "relief originally sought" in this lawsuit – a federal court ruling that the 1996 second path election violated federal constitutional rights and should be erased from the record books by re-certification or by replacement election – was not the first path "relief obtained" and was not a condition precedent to obtaining first path relief.

THERE IS NO MOOTNESS

"The burden of demonstrating mootness 'is a heavy one.' " *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979), quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). The heavy burden extends to two separate components of mootness, one of which is that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violations." *Davis*, 440 U.S. at 631 (citations omitted).[13] *see also In re Printlar Corp.*, 124 F.3d 1310, 1312 (9th Cir. 1997):

> A case is moot only if interim events have "completely and irrevocably eradicated the effects of" an allegedly improper ruling. . . . The party

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[13] Because *Yoshina I* resolved the question of how blank ballots are counted in the vote on whether to convene a constitutional convention there is no reasonable expectation that the alleged violation – the retroactive springing of a unknown vote counting rule on the unsuspecting citizenry – will recur.

> seeking mootness *has* a heavy burden to establish that there is no effective relief remaining for a court to provide. . . .

(citations omitted).

Here, Bennett cannot meet his heavy burden of showing that Act 131 has completely and irrevocably eradicated the alleged violation and that there is no effective relief remaining for a court to provide.

The complaint targeted the 1996 election – the second path, automatic ten-year election mandated by the Hawaii Constitution – as unconstitutional under the First and Fourteenth Amendments (Slip Op. at 6299-6305). Bennett sought relief from the alleged constitutional violation affecting the 1996 election in the form of either:

> (1) A certification that the constitutional convention question had been approved. This would have required undoing the certification issued in response to the *Yoshina I* the that the convention question had been rejected;
>
> or
>
> (2) A new election, the results of which would supplant and substitute for the certified results of the 1996 election.

Because Bennett failed to prove any constitutional violation, he of course obtained no judicial relief against the 1996 election. This court's opinion preserves the election certification mandated by *Yoshina I* that the convention proposal had been rejected.

The "relief" obtained from the Legislature – an optional, first path election in 1998 – does not and cannot

eradicate the results of the 1996 election. The 1996 election has *not* been recertified contrary to *Yoshina I* and does not bear the stigmatic result of "by federal court order, result undetermined until a new, fair election is held." The 1996 election result that Bennett challenges as unfair will remain in full force and effect, whatever the outcome of the 1998 election.[14]

The 1998 optional election is not the final consummation of the 1996 election. Rather, the 1998 election is a different, separate, and additional election. If, for example, the University of Southern California defeats UCLA this fall in football, it will not be able, even if it had unproven allegations of past recruiting violations, thereby to erase the record of last season's loss.

Further, it is still possible for a court to provide effective relief to Bennett against the alleged unfairness of applying the "blank votes do count" rule of *Yoshina I* to the 1996 election. At this juncture, that court is the United States Supreme Court. It may provide effective relief against the 1996 election first by holding that the election result mandated by *Yoshina I* violated federal constitutional rights and then by either ordering that the constitutional convention proposal be re-certified as approved in

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[14] Even if the 1998 election results in approving the constitutional convention proposal, that would not render meaningless the voiding of the certification of the 1996 result. An election result can never be meaningless; it has an independent legal significance. That is, whether the *1996* result is, "approved," "rejected," or "by federal court order, result undetermined until a new, fair election is held" is a legally significant event that would not be rendered meaningless by any result of the 1998 vote.

1996 or ordering an immediate election on the constitutional convention question, the vote totals and outcome of which will replace the *1996* vote totals and outcome certified under mandate of *Yoshina I*.

The short of the matter, then, is that: (1) the election required by Act 131 cannot completely and irrevocably eradicate the effect of the allegedly unfair 1996 election; and (2) the Supreme Court may still provide effective relief against the allegedly unfair 1996 election by holding that a federal constitutional violation has occurred and ordering either remedy sought.[15]

A related but distinct reason Act 131 does not even partially moot this case is, as previously explained, that the election at issue in *Yoshina I* and in this federal lawsuit was the second path, automatic ten-year election. The 1998 election scheduled by Act 131 involves the very different first path, legislative option provision. While the ballot question is the same either way, the two elections are constitutionally different creatures and necessarily cannot substitute for each other. A new election ordered by a federal court to replace a constitutionally deficient 1996 vote would be the vote that is mandated by the Hawaii Constitution and its requirement that a presumably fair vote be held at prescribed intervals. The legislative optional election is of a totally different character. It is an additional vote, but it is not mandatory, and it does

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[15] Bennett's motion does not address the potential effectiveness of a judicial remedy concerning the 1996 mandatory election if the 1998 optional election results in another rejection of the constitutional convention proposal.

not serve the purpose of the ten-year submission required by the Hawaii Constitution.

VACATUR IS UNWARRANTED

Because the case is not moot, there is no basis for the court even to consider the extraordinary post-mootness step of vacating its judgment.

In addition, the proper application of the equitable doctrine of vacatur would in any event require denial of Bennett's request. The touchstone of vacatur is equity. *Dilley v. Gunn*, 64 F.3d 1365, 1370 (9th Cir. 1995) (applying *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994).

A judgment is most likely to be vacated when the mootness results from circumstances either unattributable to any of the parties (happenstance) or attributable to unilateral action of the party who prevailed. *U.S. Bancorp*, 513 U.S. at 25. A judgment is least likely to be vacated when the party seeking relief from the judgment caused the mootness by voluntary action. *Id.* at 24; *See also Dilley v. Gunn*, 64 F.3d at 1371 (pivotal inquiry under *Bancorp* is whether appellant caused the mootness by voluntary action).

The present situation lies at the voluntary action end of the equitable spectrum and is far removed from the happenstance end. While Bennett's unsuccessful lawsuit was not the catalyst for H.B. 3130, it is clear from the documents submitted with Bennett's motion that he – the individual as distinguished from the lawsuit – strongly lobbied for passage of H.B. 3130. It is irrelevant whether

or not Bennett intended to moot the case. *Dilley v. Gunn*, 64 F.3d at 1371-72. Under the circumstances it is fair to deny the equitable remedy of vacatur. Bennett's ability to obtain review of the adverse and allegedly moot Ninth Circuit judgment was frustrated not by the "vagaries of circumstance," but by circumstances that he actively courted and in which he acquiesced. The equitable considerations that support the drastic step of vacating a judgment are plainly absent here.

CONCLUSION

For the reasons set forth in this opposition, Yoshina asks the court to deny the claim for attorneys' fees premised an the catalyst theory of prevailing party status and to deny the request to vacate the Opinion and judgment.[16]

Respectfully submitted,

/s/ Dorothy Sellers
DOROTHY SELLERS
Deputy Attorney General

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[16] Yoshina has not responded to other portions of Bennett's motion, such as the dollar accounting, not because Bennett's motion is correct but because under the circumstances no response is necessary.

[Material Deleted in Printing]

EXHIBIT B

ACT 131

H.B. NO. 3130
H.D. 1
S.D. 1

HOUSE OF REPRESENTATIVES
NINETEENTH LEGISLATURE, 1998
STATE OF HAWAII

A BILL FOR AN ACT

RELATING TO A CONSTITUTIONAL CONVENTION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Article XVII, section 2, of the Constitution of the State of Hawaii provides that the Legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" The purpose of this Act is to provide for the submission of such question to be placed on the ballot at the general election of 1998.

SECTION 2. The legislature hereby submits the question to be placed on the ballot as follows:

"Shall there be a convention to propose a revision of or amendments to the Constitution?"

SECTION 3. This Act shall take effect upon its approval.

Approved By The
Governor on
Jun 22 1998

EXHIBIT C

STATE OF HAWAII
ALL INFORMATION FOR A BILL

1998 Regular Session

Date: 7/24/98
Time: 10:32 a.m.
Page: 1
Leg. day: 64

HB 3130 HD 1 SD 1 – RELATING TO A CONSTITUTIONAL CONVENTION

By Representative(s) SOUKI (BR) / OSHIRO, P. (BR)

Keywords: CONSTITUTIONAL AMENDMENTS, ELECTIONS, VOTING

Citations:

Report Title: Constitutional convention.

Description: Presents constitutional question to the electorate. (HB3130 HD1)

1-29-98 H Introduced and passed First Reading

2-2-98 H Referred to the committee on JUD, referral sheet 7

2-9-98 H Bill scheduled to be heard by JUD on Thursday, 02-12-98 at 2:00 p.m. in House conference room 325.

2-12-98 H The committee on JUD recommends that the measure be PASSED, WITH AMENDMENTS.

2-12-98 H The votes in JUD were as follows: 9 Ayes: Rep.(s) Tom Yamane, Cachola, Herkes, Jones,

Lee, Yoshinaga, Thielen, Whalen; Ayes with reservations: Rep.(s): none Noes: Rep.(s); and 4 Excused: Rep.(s) Case, Hiraki, Menor, Pendleton

2-18-98 H Reported from the committee on JUD (Stand. Com. Rep. No. 229-98) as amended in (HD 1), recommending passage on Second Reading and placement on the calendar for Third Reading

2-18-98 H Passed Second Reading as amended in (HD 1); placed on the calendar for Third Reading with Representative(s) none voting no and Representative(s) Cachola, Menor, Morihara, Takamine, Yonamine, McDermott, Ward excused

2-20-98 H Passed Third Reading as amended in (HD 1)

2-20-98 H The vote was as follows: 47 aye(s), with none voting no and Representative(s) Kanoho, Say, Souki, Takai excused

2-20-98 H Transmitted to Senate

2-23-98 S Received from House (Hse. Com. No. 28)

2-23-98 S Passed First Reading and referred to JDC

4-6-98 S Bill scheduled to be heard by JDC on 04-09-98 at 9:00 AM in conference room 229

4-9-98 S The committee on JDC recommends that the measure be PASSED, WITH AMENDMENTS

4-9-98 S tHE VOTES IN jdc WERE AS FOLLOWS: 7 Ayes: Senator(s) Chumbley, Matsunaga, Bunda, Ihara, McCartney, Sakamoto; Ayes with reservations: Senator(s) Anderson; none Noes: Senator(s); and none Excused: Senator(s)

4-9-98 S Reported from JDC (Stand, Com. Rep. No. 3283) with recommendation of passage on Second Reading, as amended (SD 1) and placement on the calendar for Third Reading

4-9-98 S Report adopted; Passed Second Reading, as amended (SD 1)

4-9-98 S 48 hours notice

4-14-98 S Passed Third Reading, as amended (SD 1). Ayes, 25. Noes, none(). Excused, none().

4-14-98 S Transmitted to House

4-14-98 H Received from Senate (Sen. Com. No. 574) in amended form (SD 1)

4-16-98 S Notice of bill proposing constitutional amendment (04-16-98) transmitted to Governor pursuant to Article XVII, Section 3.

4-16-98 H House disagrees with Senate amendment(s)

4-17-98 S Received notice of disagreement (Hse. Com. No. 295)

4-20-98 H House conferees appointed: Tom Chairman; Herkes, Jones, Yamane, Whalen

4-21-98 S Received notice of appointment of House conferees (Hse. Com. No. 377).

4-21-98 S Senate Conferees appointed: Chumbley, Matsunaga, (Co-) Chair; Bunda, Ihara, McCartney, Sakamoto, Anderson

4-21-98 H Received notice of Senate conferees (Sen. Com. No. 662)

4-28-98 H Reconsideration of action taken on 04-16-98

4-29-98 H Passed Final Reading as amended in (SD 1)

4-29-98	H	The vote was as follows: 45 aye(s), with none voting no and Representative(s) Chang, Hiraki, Meyer, Takamine, Tom, Ward excused
4-30-98	S	Received notice of House reconsideration; agreement and passage on final reading (House Com. No. 435).
5-1-98	H	Transmitted to Governor
6-24-98	S	Act 131, 06-22-98, (Gov. Msg. No. 360)
6-24-98	H	Act 131, on 06-22-98 (Gov. Msg. No. 242)

EXHIBIT D

1997 LEGISLATIVE TIMETABLE

DATE	LEG. DAY	DEADLINE
Jan. 15th (Wed.)	1st	Opening Day.
Jan. 17th (Fri.)	3rd	Last day for unlimited bill introductions.
Jan. 21st (Tue.)	4th	5 bills/day limit begins and State-of-the-State Address.
Jan. 22nd (Wed.)	5th	State-of-the-Judiciary Address and last day to introduce the Administration's package of bills. Deadline is 5:00 p.m.

Jan. 24th (Fri.)	7th	5 bills/day limit ends and last day for bill introductions.
Jan. 27th (Mon.)		One-day recess.
Jan. 31st (Fri.)	11th	Last day for organizations to submit grant and subsidy requests to the Legislature.
Feb. 14th (Fri.)	21st	First Lateral. All bills to final committee.
Feb. 20th (Thur.) through Feb. 26th (Wed.)		Mandatory five-day recess.
Feb. 28th (Fri.)	25th	Filing deadline for First Decking. Last day to check non-budget bill for Third Reading in the Originating body.
March 3rd (Mon.)		One-day recess.
March 4th (Tues.)	26th	Filing deadline for budget bills.
March 5th (Wed.)		One-day recess.
March 6th (Thurs.)	27th	First crossover. Last day for Third Reading of bills in the originating body.
March 10th (Mon.)	29th	6 substantive resolutions/day limit begins.
March 14th (Fri.)	33rd	Last day to introduce substantive resolutions. 6 substantive resolutions/day limit ends.

March 21st (Fri.)	38th	Second Lateral. All bills to final committee.
March 31st (Mon.)	42nd	First Lateral for concurrent resolutions. All concurrent resolutions to final committee.
April 4th (Fri.)	46th	Filing deadline for Second Decking. Last day to deck bills that were amended by the receiving (non-originating) body.
April 7th (Mon.)		One-day recess.
April 9th (Wed.)		One-day recess.
April 10th (Thur.)	48th	Second Crossover. Last day for Third Reading of bills that were amended by the receiving (non-originating) body.
		First Crossover for concurrent resolutions. Last day to pass concurrent resolutions to the non-originating body.
April 11th (Fri.)	49th	Disagree. Last day to disagree with the other body's drafts of bills.
		Deadline for final form of constitutional amendments.
April 21st (Mon.)	55th	Second Crossover for concurrent resolutions. Last day to pass concurrent resolutions that were

		amended by the receiving (non-originating) body.
April 24th (Thur.)	58th	Last day to file non-fiscal bills to deck for Final Reading.
April 25th (Fri.)	59th	Last day to file fiscal bills to deck for Final Reading.
April 28th (Mon.)		One-day recess.
April 29th (Tue.)	60th	Adjournment sine die.
June 19th (Thur.)		38th day after adjournment which is the last for the Governor to give notice of bills he plans to veto.
July 3rd (Thur.)		45th day after adjournment which is the last day for the Governor to consider bills. The Legislature may convene in special session to act on vetos.

/S/ Norman Mizuguchi
NORMAN MIZUGUCHI
Senate President

1/2/97
Date

/S/ Joseph M. Souki
JOSEPH M. SOUKI
Speaker of the House

1/2/97
Date

EXHIBIT E

[SEAL]

STATE OF HAWAII
OFFICE OF ELECTIONS

802 LEHUA AVENUE
PEARL CITY, HAWAII 98782

DWAYNE D. YOSHINA
CHIEF ELECTION OFFICER

TESTIMONY OF THE
CHIEF ELECTION OFFICER, OFFICE OF ELECTIONS
TO THE SENATE COMMITTEE ON JUDICIARY
ON HOUSE BILL NO. 3130 HD 1
RELATING TO A CONSTITUTIONAL CONVENTION
April 9, 1998

Chair Chumbley, Chair Matsunaga, and Senate Committee on Judiciary, thank you for this opportunity to testify on House Bill No. 3130 HD 1, on behalf of the Office of Elections.

House Bill No. 3130 HD 1 will impact the Office of Elections by increasing our ballot costs by approximately $142,709. If the Constitutional Convention question is voted upon during the 1998 General Election, we will need to print an additional ballot that has not been budgeted for.

Thank you for this opportunity to testify.

[SEAL]

STATE OF HAWAII
OFFICE OF ELECTIONS

802 LEHUA AVENUE
PEARL CITY, HAWAII 98782

DWAYNE D. YOSHINA
CHIEF ELECTION OFFICER

TESTIMONY OF THE
CHIEF ELECTION OFFICER, OFFICE OF ELECTIONS
TO THE HOUSE COMMITTEE ON JUDICIARY
ON HOUSE BILL NO. 3130
RELATING TO A CONSTITUTIONAL CONVENTION
February 12, 1998

Chairman Tom, and members of the House Committee on Judiciary, thank you for this opportunity to testify on House Bill No. 3130, on behalf of the Office of Elections.

House Bill No. 3130 will impact the Office of Elections by increasing our ballot costs by approximately $142,709. If the Constitutional Convention question is voted upon during the 1998 General Election, we will need to print an additional ballot that has not been budgeted for.

Thank you for this opportunity to testify.

APPENDIX R

HOUSE JOURNAL – 21st DAY

THIRD READING

H.B. No. 3130, HD1:

Representative Okamura moved that H.B. No. 3130, HD1, pass Third Reading, seconded by Representative M. Oshiro.

Representative Kawananakoa offered the following amendment to H.B. No. 3130, HD1:

"SECTION 1. House Bill 3130 H.D.1 is amended by amending line 12 on page 1 to read:

'SECTION 3. [This Act shall take effect upon its approval] *In connection with said election, the office of Elections shall provide voters with a description stating, in the words of the Hawaii Supreme Court, that " 'ballots cast' within the meaning of Article XVII, section 2 of the Hawaii Constitution, includes blank ballots and over votes: in other words, blank ballots and over votes shall be treated as no votes on the question of whether a constitutional convention should be convened."*

'Section 4. This Act shall take effect upon its approval."

Representative Kawananakoa moved that the amendment be adopted, seconded by Representative Pendleton.

Representative Kawananakoa rose to speak in support of the amendment, stating:

"Mr. Speaker, the purpose of this amendment is to ensure that we don't end up in the same mess that we are in right now. It is very clear.

"As you know, Mr. Speaker, last election a majority of the votes cast as 'yes' outnumbered the votes cast as 'no' for the question on calling for a constitutional convention.

"Therefore, my estimation is that the people of Hawaii believe that they have spoken and have clearly said that they wanted a constitutional convention.

"The powerful special interest groups that don't want any changes to government that is benefitting them, petitioned the Hawaii Supreme Court to overrule the people's mandate by arguing that the blank votes and the spoiled votes should be cast and counted as 'no' votes, Mr. Speaker. The court agreed on technical grounds and the people's will was thwarted.

"This decision was appealed to the Federal Court and Judge Ezra ruled that under the Hawaii State Supreme Court's ruling and their decition [sic], the vote was unfair – greatly unfair – because the people didn't know that the blank and spoiled votes would be considered as 'no' votes.

"So here we are today, passing this measure calling for a constitutional convention, which I am in complete support of, but I am concerned because we want to set the record straight so we don't end up in the same mess again.

"This amendment simply calls for a clarification so that our Elections Officer will include or otherwise inform the public and ensure that they know that when they don't vote, if they give a blank vote, or they over

vote, or they spoil their ballots, that these will be considered 'no' votes, and with that the people would be able to clearly vote their conscience and understand the ramifications of being silent. You notice this in Hawaii: If you're not sure, you don't want to talk 'stink', you just don't say anything. So a lot of people may have just remained silent, because they didn't know it was going to be counted as a 'no' vote. So we are going to pass this measure and many of our constituents, many of the people of Hawaii, will still be in the dark. They still won't know in their mind that their silence will be counted as a 'no' vote on whether or not to have a constitutional convention.

"I think it is incumbent upon us to set a fair question before the people of Hawaii on such an important matter. I would encourage all of my colleagues to do the democratic thing: vote 'yes' for this amendment. Give the people a fair shake, a fair understanding, of what they are voting on.

"Thank you, Mr. Speaker."

[Material deleted in printing]

No. 98-671

(2)

Supreme Court, U.S.
FILED
DEC 4 1998
CLERK

In The

Supreme Court of the United States

October Term, 1998

CITIZENS FOR A CONSTITUTIONAL CONVENTION, LET THE PEOPLE DECIDE, and MARK J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, and JERRY BECK, on behalf of themselves and others similarly situated,

Petitioners,

v.

DWAYNE D. YOSHINA, Chief Election Officer of the State of Hawaii, MAZIE K. HIRONO, Lieutenant Governor of Hawaii, BENJAMIN J. CAYETANO, Governor of the State of Hawaii, in their official capacities; OFFICE OF ELECTIONS, STATE OF HAWAII; HAWAII STATE AFL-CIO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

STEVEN SCOTT MICHAELS*
*Counsel of Record
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, NY 10022
(212) 909-7265

MARK J. BENNETT
McCORRISTON MIHO MILLER MUKAI
Five Waterfront Plaza
Honolulu, HI 96813
(808) 529-7300

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners Citizens for a Constitutional Convention, et al., file this Supplemental Brief to call the Court's attention to intervening matters not available at the time the Petition for Certiorari was filed, and the effect of these new matters on the proper disposition of this case.

These intervening matters are: (a) the results of the November 3, 1998, general election vote upon whether there shall be a constitutional convention – the vote directed by Act 131, 1998 Haw. Sess. L.; and (b) the continued inaction by the Ninth Circuit upon Petitioners' July 7, 1998, Motions (1) to Transfer Plaintiffs' Claim for Attorneys' Fees to the District Court, or, in the Alternative, for Award of Attorneys' Fees on Appeal, (2) to Recall the Mandate, and (3) to Vacate the Judgment and Remand With Instructions.[1]

SUPPLEMENTAL STATEMENT

1. Pursuant to the directive of Act 131, 1998 Haw. Sess. L. (Pet. App. 270a), the constitutional convention question appeared again on the 1998 November general election ballot. As to that question, the Office of Elections, State of Hawaii, has reported as follows:[2]

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[1] These motions appear at Appendix P to the Petition.

[2] The following totals are taken from the Office of Elections' "Statewide Summary Report" dated November 4, 1998 (9:25 a.m.), a document which is a public record.

CONSTITUTIONAL CONVENTION QUESTION			
CONVENTION TO REVISE OR AMEND CONST[ITUTION]	YES	140688	34.1
	NO	244753	59.3
	Blank Votes	26784	6.8
	Over Votes	295	0.1

2. Meanwhile, the Ninth Circuit has failed to take any action upon Petitioners' July 7, 1998, Motions (1) to Transfer Plaintiffs' Claim for Attorneys' Fees to the District Court, or, in the Alternative, for Award of Attorneys' Fees on Appeal, (2) to Recall the Mandate, and (3) to Vacate the Judgment and Remand With Instructions. Indeed, the court of appeals has not even ruled upon a Motion to Expedite Decision on Pending Motions filed by Petitioners on October 9, 1998 (*see* Supp. App. A, *infra*), even though this motion was unopposed by Respondents.

SUPPLEMENTAL REASONS FOR GRANTING THE WRIT

Although the results of the November 3, 1998, vote do not fully moot this case, they point out, in a critical, added way, why this case has been fundamentally reshaped by Act 131, and why a GVR order, or, alternatively, an order granting plenary review, should issue. The lower court's complete inaction on Petitioners' July 7, 1998, motions also demonstrates forcefully why certiorari should be granted.

First, if they show nothing else, the results of the November 3, 1998, vote demonstrate just how important the *advance* knowledge of the supermajority rule announced in the *Yoshina* decision is to Hawaii voters – and would have been to those voters in 1996. Compared to the more than twelve percent who turned in blank ballots in 1996, less than seven percent of voters turned in blank ballots in 1998. Forced by the *Yoshina* rule to choose, Hawaii voters overwhelmingly voted "yes" or "no." They were not "don't care" voters, as disparagingly described by the court of appeals. This fact alone undermines the rationale of the judgment below.[3]

Second, the fact that the 1998 vote occurred, without more, furthers the claim that Petitioners are, at a minimum, at least partially "prevailing parties" within the meaning of 42 U.S.C. § 1988. Any past argument that Petitioners' claim for attorneys fees and costs was premature has been overtaken by the November vote itself. Petitioners prayed alternatively in the District Court for a new vote, and that vote has now occurred. Though the

---

[3] The wide disparity in the 1996 and 1998 votes on the convention question only highlights the substantiality of Petitioners' claim for the remedy of a certification order as to the 1996 vote. Although Act 131 remedied one aspect of the unfairness visited by the *Yoshina* decision, it permitted the State unconstitutionally to "depreciate the votes" of those who voted in 1996 in favor of the constitutional convention by requiring those voters to win two elections instead of one, thus placing this case in diametrical conflict with *Roe v. Alabama*, 68 F.3d 404, 407 (11th Cir. 1995). The ability of the several vested interests opposing a convention to mount a campaign that resulted in fewer voters voting yes in 1998 than in 1996 only testifies to the incompleteness of "re-do" relief.

convention question did not pass in 1998, the 1998 plebescite, where rules for counting votes were clear beforehand, vindicated a basic purpose of the Due Process Clause of the Fourteenth Amendment – "the purpose of making an individual feel that the government has dealt with him fairly." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 196 n.14 (1985). *Accord*, *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978).

Third, as the Ninth Circuit's continued inaction makes painfully obvious, unless this Court grants the writ, the Due Process violation generated by the *state* courts, even if remedied by the state legislature, will be compounded by a Due Process violation generated by the *federal* courts as to the fees and costs issues that have arisen in this federal litigation. Petitioners are entitled as a matter of Due Process – the Due Process guaranteed by the Fifth Amendment – to have their claim for attorneys' fees and costs under § 1988 (and their claim for vacatur of the costs taxed against them) adjudicated on the merits by a federal court. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). The Ninth Circuit's continuing refusal to decide those important claims, which have been pending for approximately five months, forcefully counsels granting a writ of certiorari.

CONCLUSION

For the foregoing supplemental reasons and for those stated in the petition, the petition for certiorari should be granted, the judgment should be vacated, and the case

remanded to the Court of Appeals for further consideration of Petitioners' claims for equitable relief, attorneys fees, and other costs, in light of Act 131, its history, and the vote had on November 3, 1998, or with such other instructions as the Court finds appropriate.

In the alternative, the Court should grant plenary review as to the second question presented.

Respectfully submitted,

STEVEN SCOTT MICHAELS*
*Counsel of Record
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, NY 10022
(212) 909-7265

MARK J. BENNETT
McCORRISTON MIHO MILLER MUKAI
Five Waterfront Plaza
Honolulu, HI 96813
(808) 529-7300

Counsel for Petitioners

December 3, 1998

SUPPLEMENTAL APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, JERRY BECK, LET THE PEOPLE DECIDE, AND CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves, and others similarly situated,	) Appeal Nos.) 97-16408 &) 97-16543)) D.C. Civ. No.) 97-00322) DAE) Hawaii) (Honolulu)
Plaintiffs-Appellees, Cross-Appellants,	))
vs.	)
DWAYNE D. YOSHINA, Chief Election Officer of the State of Hawaii, et al.,	))
Defendants-Appellants, Cross-Appellees.	))

(Filed Oct. 9, 1998)

PLAINTIFFS' MOTION TO EXPEDITE DECISION ON PENDING MOTIONS

Plaintiffs-appellees Mark J. Bennett, et al., respectfully move this Court pursuant to Fed. R. App. P. 27 and 28 U.S.C. § 1651 to expedite decision on the motions filed in Appeal Nos. 97-16408 and 97-16543 filed herein on July 7, 1998. These motions sought post-mandate relief in light of the enactment of legislation placing the constitutional convention question on the November general election

ballot in the State of Hawaii. Briefing of these motions was completed on August 11, 1998.[1]

Plaintiffs' timely-filed Petition for Rehearing in Nos. 97-16408 and 97-16543 was denied on June 23, 1998. On September 11, 1998, Associate Justice O'Connor extended the time, from September 21, 1998, to and including October 21, 1998, in which Plaintiffs may file a petition for certiorari seeking review of the judgment as to which rehearing was denied on June 23, 1998. Copies of the notice of Justice O'Connor's order and of the application for extension of time (without exhibits) are attached as Exhibits A and B.

Although the order extending time was issued upon consent, the Supreme Court rules indicate that an extension of time is generally disfavored. *See* U.S. S. Ct. R. 13.5. Plaintiffs' stated reasons for seeking an extension (in addition to the fact of consent) were as presented follows:

> An extension would grant the court below time to act and eliminate or drastically narrow any need to seek a writ of certiorari; it is also warranted because the federal merits issues herein are substantial, and, at a minimum, the judgment, if not altered below, plainly warrants review, if only for the purposes of vacating it in light of Act 131.

Exhibit B at 4-5 (footnote omitted).

---

[1] Briefing of a related set of motions in the related attorneys' fee appeal, No. 98-15204, was completed on August 13, 1998. As Plaintiffs stated in that appeal, it is appropriate that these related motions be decided together with the pending motions in these appeals.

Having not received notice of this Court's action on the pending motions, Plaintiffs thus respectfully move the Court to expedite consideration of those motions so that the parties and the Supreme Court of the United States may timely have the benefit of this Court's decision.

If the Court cannot decide the pending motions prior to October 21, 1998, the deadline for the filing of the Petition for Certiorari, then at a minimum Plaintiffs respectfully pray that the Court act on the pending motions prior to November 6, 1998, two weeks prior to the initial deadline for the opposition to the petition for certiorari.[2] This Court's action by November 13, 1998, will permit Plaintiffs to file, in advance of the Defendants' deadline for filing of the opposition to certiorari, a supplemental brief pursuant to Sup. Ct. R. 15.8 explaining to the Supreme Court the significance of this Court's ruling on the pending motions, including, if appropriate, the fact that this Court has mooted the need to grant review here.

---

[2] As a condition of consenting to Plaintiffs' request for extension of time to petition for certiorari, Defendants requested Plaintiffs' anticipatory consent to a 30-day extension of time in which to file the opposition to the petition for certiorari, if Defendants so requested after the petition was filed. That consent has been given and is reaffirmed here.

Dated: New York, New York, October 8, 1998.

McCORRISTON MIHO MILLER MUKAI
MARK J. BENNETT, ESQ.

DEBEVOISE & PLIMPTON

/s/ Steven S. Michaels
STEVEN S. MICHAELS, ESQ.
Attorneys for Plaintiffs-
Appellees/Cross-Appellants

[EXHIBIT DELETED]

Supreme Court, U.S.
FILED
DEC 15 1998
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No. 98-671

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITIZENS FOR A CONSTITUTIONAL CONVENTION, LET THE PEOPLE DECIDE, MARK. J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, and JERRY BECK, on behalf of themselves and others similarly situated,

Petitioners,

v.

DWAYNE D. YOSHINA, Chief Election Officer of the State of Hawaii, MAZIE K. HIRONO, Lieutenant Governor of Hawaii, BENJAMIN J. CAYETANO, Governor of the State of Hawaii, in their official capacities; OFFICE OF ELECTIONS, STATE OF HAWAII,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

Dorothy D. Sellers
Girard D. Lau*
*Counsel of Record
Deputy Attorneys General
Department of the Attorney General
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1360

Counsel for Respondents

CASILLAS PRESS • 1717 K STREET, N.W. • WASHINGTON, D.C. 20036 • 1-800-947-2650

PARTIES TO THE PROCEEDING

The petitioners to this proceeding are five individuals and two associations. The individuals are Mark J. Bennett, Charles S. Frumin, Bobbie Carinio, Mark R. Spengler, and Jerry Beck. The associations are Let the People Decide and Citizens for a Constitutional Convention.[1]

The respondents are a Hawaii state agency--the Hawaii Office of Elections--and three Hawaii state officials named solely in their official capacity--Governor Benjamin J. Cayetano, Lieutenant Governor Mazie K. Hirono, and Chief Election Officer Dwayne D. Yoshina.

The Hawaii State AFL-CIO and a number of individuals were denied intervention in the courts below and are not parties to this proceeding.

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[1]This case was captioned *Bennett v. Yoshina* from its commencement through all the Ninth Circuit proceedings. In their petition for a writ of certiorari, petitioners spontaneously have rearranged the order in which they list themselves in the caption.

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CHRONOLOGY[2]

1996

November 5 General Election Day

November 5 Vote on constitutional convention question:
163,869 - yes
160,153 - no
45,245 - blank
90 - spoiled

November 19 Attorney General opinion--constitutional convention question approved

November 25 Complaint filed in *Yoshina* in Hawaii Supreme Court original proceeding

1997

January 24 Last day for bill introductions in 1997 Legislature

March 24 Hawaii Supreme Court decides *Yoshina*--constitutional convention question rejected

March 24 Office of Elections certifies constitutional convention question as rejected in compliance with Yoshina

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[2]This chronology largely reproduces the chronology appearing at Pet. App. 247a-248a and is based on the case record, except for the last three entries, which are matters of public record (and relied upon in petitioners' supplemental brief).

April 15	Bennett files complaint in federal district court, seeks alternative relief *either* of new election *or* of re-certification of constitutional convention as approved
May 1	Hawaii Legislature adjourns
July 11	Federal district court enters judgment for Bennett requiring special election; enjoins application of *Yoshina* to 1996 election
July 15	Yoshina appeals
August 11	Bennett cross appeals on theory that district court selected the wrong alternative relief requested
September 10	Ninth Circuit grants stay of special election and expedites appeals
October/ November	Appeal and cross-appeal briefed

1998

January 16	Ninth Circuit hears argument in San Francisco
January 21	Hawaii Legislature convenes for 1998 session.
January 28	H.B. 3130 introduced in House of Representatives
February 20	H.B. 3130 passes third House reading and transmitted to Senate
March 27	Ninth Circuit issues Opinion--Bennett loses; Yoshina awarded costs on appeal from Bennett

April 10	Bennett petitions Ninth Circuit for rehearing and rehearing en banc
April 14	H.B. 3130 passes third Senate reading as amended
April 29	House agrees to Senate amendments
May 1	H.B. 3130 transmitted to Governor
May 5	Bennett moves Ninth Circuit to stay consideration of rehearing because of H.B. 3130
May 22	Bennett supplements motion to stay with update on status of H.B. 3130
June 22	Governor approves H.B. 3130 (Act 131)
June 23	Ninth Circuit non-substantively amends Opinion and denies rehearing requests
July 1	Ninth Circuit enters mandate; $418.60 costs taxed against Bennett
July 7	Bennett files in Ninth Circuit "Suggestion of partial mootness and plaintiffs' motions (1) to transfer plaintiffs' claim for attorneys fees to the district court, or, in the alternative, for award of attorneys' fees on appeal; (2) to recall the mandate, and (3) to vacate the judgment and remand with instructions" (the fee request)
August 5	Yoshina opposes fee request in Ninth Circuit
October 21	Bennett files petition for a writ of certiorari
October 29	Ninth Circuit notified of filing of petition for a writ of certiorari

November 3 General election day

November 3 Vote on constitutional convention question:

244,753 - no
140,688 - blank
26,784 - yes
295 - spoiled

November 23 Time for election challenge expires; constitutional convention question certified as rejected.

STATEMENT

A. INTRODUCTION

In order of importance to *petitioners,* the issues presented by the petition are: (1) petitioners' quest for attorneys' fees for losing a case in the Ninth Circuit; and (2) the merits of the Ninth Circuit opinion.

In their lawsuit, petitioners asked for the alternative relief of an order *either* directing a re-vote of the 1996 constitutional convention question *or* directing the re-certification of the 1996 vote as having approved the constitutional convention question.

Petitioners obtained neither of the alternative forms of relief requested because the Ninth Circuit held that the challenged 1996 election did not violate the United States Constitution. *After* the Ninth Circuit ruled against petitioners, the State of Hawaii gratuitously enacted Act 131, placing the constitutional convention on the ballot in the November 1998 election. Petitioners then represented to the Ninth Circuit that the re-vote alternative was the principal relief sought. "[Act 131] grants Plaintiffs the principal relief sought in this litigation--a new election on the convention question." (Pet. App. 179a)

In November 1998, the constitutional convention question was *again* rejected.

Petitioners ask this court to grant a writ of certiorari on two grounds. They ask this Court to GVR this case--to *grant* certiorari, *vacate* the judgment of the Ninth Circuit and *remand* to the Ninth Circuit for consideration, in light of Act 131, of petitioners' claims for attorneys' fees premised on the theory that their lawsuit was the catalyst for Act 131. In fact, the Ninth

Circuit was fully apprised of the potential enactment of Act 131 throughout the pendency of petitioners' unsuccessful request for rehearing.

The petition in this Court is premature because petitioners' fee request is pending in the Ninth Circuit.

The equities, including petitioners' lobbying in support of Act 131, do not support vacating the judgment.

The catalyst claim is insubstantial both chronologically and on the merits. The Ninth Circuit rejected petitioners' constitutional claims *in toto* three months *before* Act 131 was enacted. And, no court has awarded attorneys' fees on a catalyst theory for a total, across-the-board litigation defeat.

There is no basis in the procedural facts of this case for issuance of a GVR order, and there is particularly no basis for issuance of a GVR order when, as here, the decision below does not merit review.

In order to eliminate their loss in the Ninth Circuit to pursue their claim for attorneys fees, petitioners ask this Court, if the GVR request is rejected, to grant plenary review of the merits of the Ninth Circuit decision to afford petitioners the "alternative" relief of an order re-certifying as approved the 1996 election result now certified as rejected.

The Ninth Circuit's decision that there was no constitutional violation is correct and accords with the law of all other circuits on the narrow circumstances in which federal courts may take the drastic step, fraught with implications for federalism and state sovereignty, of intervening in state elections. The law lies evenly over the land. The application of the law to vastly differing fact situations of course results in differing outcomes from case to case--sometimes plaintiffs prevail, sometimes defendants--but the law is constant.

Moreover, the "alternative" relief of re-certification of the 1996 election results is not available to petitioners, because, under their own theory of having obtained the principal relief sought of a new election, re-certification relief would be cumulative and duplicative rather than alternative. In addition, the retrospective undoing by a federal court of a certified state election would violate the Eleventh Amendment and would require, completely contrary to the decision in *Yoshina* of the Hawaii Supreme Court as the final arbiter of the Hawaii Constitution, that blank ballots *not* be counted as ballots cast upon the question.

B. FACTS

1. The 1996 General Election

Article XVII, Section 2 of the Hawaii Constitution provides two different methods for submitting to the electorate the question whether to convene a constitutional convention. Under the first, the Hawaii Legislature may submit the question as often as it pleases at any general or special election. Under the second, the constitutional convention question must be automatically submitted to the electorate no less frequently than every ten years at a general election.

The constitutional convention question was included in the November 5, 1996 general election as an automatic ten-year submission. Of the total 369,357 ballots:

163,869	were marked yes,
160,153	were marked no,
45,245	were left blank, and
90	were marked both yes and no (overvotes)

The Hawaii Constitution provides that a proposed constitutional convention is approved if "a majority of the ballots cast upon such a question" are in the affirmative. (Haw. Const. art. XVII, § 2).

In the thirty-seven years of Hawaii statehood preceding the 1996 election, no Hawaii court had ever interpreted or been asked to interpret this language. There had been no need to interpret it because the blank ballots were irrelevant to the outcome of the three prior votes (all of the automatic ten-year variety) in 1966, 1976, and 1986 on convening a constitutional convention.

The 1996 vote was sufficiently close that the outcome turned on whether the constitutionally-required calculation of "a majority of the ballots cast upon such a question" was based on only the yes or no ballots or whether the calculation included the blank ballots as well.

The Chief Election Officer requested the opinion of the Hawaii Attorney General on how to calculate a majority under Article XVII, Section 2. The Attorney General's response, not formed in an adversarial context, was that the blank ballots were not ballots cast upon the question and that the constitutional convention question had been approved.

2. Hawaii Supreme Court

The Hawaii State AFL-CIO and others filed a timely original adversarial election contest against respondents in the Hawaii Supreme Court, requesting judgment that the constitutional convention question had been rejected. The Hawaii Supreme Court is "the ultimate judicial tribunal in the state" and has "final unreviewable authority to interpret and enforce the Hawaii Constitution." *State v. Fields*, 686 P.2d 1379, 1390 (Haw. 1984) (citation omitted).

The Hawaii Supreme Court held that the convention question had been rejected because a majority of ballots cast on the question--including the blank ballots--were not affirmative votes. *Hawaii AFL-CIO v. Yoshina*, 935 P.2d 89 (Haw. 1997) *(Yoshina)*. Its opinion was based on: (1) the singular language of Article XVII, Section 2; (2) the intent of the framers of the Hawaii Constitution, based on the court's diligent review of the proceedings of the 1950 constitutional convention; and (3) the purposeful distinction in Article XVII, Section 2 between the "majority of the *ballots cast* upon such a question" required for convening a convention and the "majority of all the *votes tallied* upon the question" required for approving convention-proposed amendments (emphases added). *Yoshina*, 935 P.2d at 91-98.

The final sentence of *Yoshina* directed the Chief Election Officer to certify that the question had been rejected, and he immediately did so.

3. United States District Court

Petitioners filed their federal complaint three weeks after the Hawaii Supreme Court decided *Yoshina*. The primary theory of the complaint was that *Yoshina* was unforeseeable and rendered the election on the constitutional convention question fundamentally unfair in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Petitioners requested from the court the *alternative* relief of *either*: (1) ordering respondents to certify, precisely contrary to the holding in *Yoshina*, that the voters had approved the constitutional convention question at the 1996 general election; *or* (2) ordering respondents to hold a special election to re-vote the precise question that the Hawaii Supreme Court held in *Yoshina* was rejected.

Respondents defended on the grounds that *Yoshina* was neither unforeseeable nor unfair. The Hawaii Supreme Court ruled on a question of first impression and interpreted constitutional language that has no counterpart in Hawaii or elsewhere. Second, the past practice in Hawaii was to include blank ballots in the vote count. They were counted *as cast* as blank ballots, along with the other categories of yes, no, and spoiled.

There was no past practice concerning whether in calculating a "majority of the ballots case upon such a question," the blank ballots should be assigned along with the separate no ballots to the denominator of ballots cast, as *Yoshina* held, or should just be disregarded as though they had never been cast, as petitioners contended.

The sum total of "past practice" evidence preceding the 1996 general election on the issue comprised the conflicting facts that: (1) in *1966*, voters were forewarned that blank ballots would be counted as ballots cast in the denominator of the calculation in the same manner as would the no votes (CR 22 S.J. Opp'n Ex. B); and (2) in *1996*, two business days before the election, the Office of Elections printed up but did not distribute its fact sheet stating that blank ballots would not be included in the calculation of a majority on the constitutional convention question (CR/ER 8 Ex. 6).

There is no evidence during the thirty years between 1966 and 1996 of any fact sheet or similar pronouncement by any state election official concerning the treatment of blank ballots in calculating the constitutionally-required majority for convening a constitutional convention.

The district court decided the case on cross motions for summary judgment. The court: (1) granted petitioners' motion, (2) denied respondents' motion, (3) enjoined the application of

Yoshina to the 1996 election, thereby nullifying the judgment of the Hawaii Supreme Court on the very issue presented to it, and (4) ordered respondents to hold a special election to re-vote the constitutional convention question.

4. Ninth Circuit Opinion

Respondents appealed the judgment entered against them, and petitioners cross-appealed as to the relief granted. The Ninth Circuit stayed the special election ordered by the district court. On the merits, the Ninth Circuit found that the Hawaii Supreme Court's decision in *Yoshina*, applying its "blank votes count as ballots cast" rule to the 1996 vote, did not violate petitioners' substantive due process rights. The Ninth Circuit reversed the judgment in favor of petitioners, remanded with instructions to enter judgment in favor of respondents, and dismissed petitioners' cross appeal seeking an order certifying as approved the rejected 1996 constitutional convention question.

The Ninth Circuit opinion reflects a straightforward application of the law, *uniform from circuit to circuit*, that federal courts will not intervene in state elections in the absence of egregious wrongdoing.

5. Petition for Rehearing

Petitioners filed for rehearing and suggested the appropriateness of rehearing en banc. The petition was filed April 10 and denied June 23, 1998. The mandate issued July 1, 1998 and included the taxation of $418.60 costs against petitioners.

6. 1998 Legislative Proceedings

The Hawaii Legislature convened January 21, 1998--five days after the oral argument in the Ninth Circuit in this case.

The legislature entertained a bill (H.B. 3130) to submit the constitutional convention question to the voters at the November 1998 general election. The Ninth Circuit issued its opinion, rejecting petitioners' claims in their entirety, on March 27, 1998. A full month after that date, the bill was passed by the legislature and transmitted to the governor, who signed it into law (Act 131) June 22, 1998, three months after the Ninth Circuit's decision.

On June 23, 1998, the day after the governor signed H.B. 3130 into law, the Ninth Circuit non-substantively amended its March 1998 opinion and denied the petition for rehearing and rejected the suggestion of rehearing en banc.

During the time that the petition for rehearing was pending, petitioners twice notified the Ninth Circuit of the existence and status of the bill in the Hawaii Legislature to submit the constitutional convention question to the voters in November 1998. Specifically, petitioners filed pleadings on May 5 and May 22, 1998 to stay consideration of their rehearing requests because of the potential enactment of Act 131. Page 3 of the May 5 motion advised the court of petitioners' theory that Act 131 "may result in mooting some or all of the issues currently involved in this case."

As a result of Act 131, the constitutional convention question was submitted to the electorate by legislative option at the November 3, 1998 general election. The question was again rejected. The vote was:

140,688 - yes
244,753 - no
26,784 - blank
295 - spoiled

The election was not challenged, the time for so doing expired November 23, 1998, and the Office of Elections has certified the 1998 constitutional convention question as rejected.

7. Post-Mandate Legal Proceedings

After the Ninth Circuit issued its mandate, petitioners filed their cumbersomely-titled, convoluted, and voluminous "suggestion of partial mootness and plaintiffs' motions (1) to transfer plaintiffs' claim for attorneys' fees to the district court, or, in the alternative, for award of attorneys' fees on appeal, (2) to recall the mandate, and (3) to vacate the judgment and remand with instructions" (the fee petition). The theory of the fee petition was that petitioners' unsuccessful lawsuit was the catalyst for Act 131 and that petitioners were therefore transformed into the prevailing party and entitled to attorneys fees.[1]

Respondents' opposition to the fee petition, filed August 6, 1998, argued that petitioners' lawsuit could not qualify as the catalyst for Act 131, even in the circuits that recognize the catalyst theory of fee recovery, that respondents' appeal was not moot, and that there was no basis for vacating the judgment. (Pet. App. Q).

The Ninth Circuit did not act on the fee petition before petitioners filed their petition in this Court for a writ of certiorari.

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[1]Petitioners contemporaneously filed in the district court a document entitled "Plaintiffs' motions for attorneys fees, to vacate taxation of costs against plaintiffs, and to vacate judgment in part and to dismiss in part as moot." The motion included as an exhibit petitioners' fee petition in the Ninth Circuit. The district court, faced with a motion to tamper with the Ninth Circuit judgment, sua sponte dismissed the motion without prejudice as premature.

ARGUMENT

A. THERE IS NO BASIS FOR ISSUANCE OF A GVR ORDER

1. The GVR Request is Premature

Petitioners have moved the Ninth Circuit to determine that Act 131 has mooted respondents' appeal (but not petitioners' cross-appeal), to recall the mandate and vacate the panel decision, and to remand to the district court for an attorneys' fee determination (Pet. App. 178a-241a). The Ninth Circuit did not rule on petitioners' motion before the petition for a writ of certiorari was filed in this Court.

There is no reason for this Court to consider these matters before the Ninth Circuit completes its consideration, and there is no reason for this Court to consider the fee petition in the first instance.[2] The "limbo" of which petitioners complain (Pet. 24) results from their own voluntary action in pursuing their fee petition on three separate fronts in the district court, the Ninth Circuit, and this Court. The Ninth Circuit should be afforded the opportunity to decide the fee issue first. This would give the Court the benefit of a ruling to review and may well obviate any need for review by this Court.

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[2]If the Ninth Circuit granted petitioners the complete relief they requested, petitioners would likely not be seeking certiorari.

The only technical difference is that if this Court grants the GVR request, it would be *vacating the Ninth Circuit's judgment* (with the Ninth Circuit then reconsidering what to do in light of Act 131). But petitioners' pending motion before the Ninth Circuit also asks the Ninth Circuit to vacate its judgment.

2. GVR Could Not Reasonably Result In A Redetermination

GVR is not appropriate because the Ninth Circuit had full opportunity to consider petitioners' claim of mootness based on Act 131. As petitioners themselves acknowledge, the Ninth Circuit panel "was told of the potential enactment of Act 131 on May 5, 1998 (Pet. at 7)" and was specifically advised of petitioners' theory of mootness. Thus, the Ninth Circuit had fully seven weeks to consider the impact, if any, of enactment of Act 131 on their opinion.

While the facts that the Ninth Circuit was fully apprised of and had ample time to consider the impact of Act 131 do not absolutely prohibit GVR, *see Lawrence v. Chater,* 516 U.S. at 169-70, they strongly counsel against it. This Court's "GVR power should be exercised sparingly." *Lawrence v. Chater,* 516 U.S. at 173. There is no compelling reason to return this case to the Ninth Circuit for consideration of Act 131 when the Ninth Circuit was fully apprised of, and presumably considered, the potential enactment of Act 131 long before it denied rehearing.[3]

3. Petitioners' Lawsuit Was Not the Catalyst for Act 131

The driving force behind the petition for a writ of certiorari is the claim that petitioners' lawsuit was the catalyst for enactment of Act 131, thereby transforming petitioners to prevailing parties and entitling them to attorneys' fees and costs.

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[3]Furthermore, Act 131 was enacted into law on June 22, 1998, one day before the Ninth Circuit issued its denial of the petition for rehearing. Thus, not only did the Ninth Circuit have seven weeks to consider the impact of the *potential* enactment of Act 131, the Ninth Circuit denied the petition for rehearing *after* Act 131 was in fact enacted.

The catalyst claim does not justify granting the writ. First, petitioners did not obtain any injunctive relief or settlement or consent judgment or comparable relief in their lawsuit. Exactly the opposite is true; petitioners lost across the board in the Ninth Circuit. They obtained *nothing* in their lawsuit. They owe costs.

If anything, it was the *complete failure* of petitioners' lawsuit that served as the catalyst for Act 131. To those Hawaii citizens in favor of convening a constitutional convention, Act 131 would have been *unnecessary* if petitioners had succeeded in their federal lawsuit. Act 131 was "necessary" only because of petitioners' complete litigation *failure*. Petitioners are illogically saying that they are entitled to attorneys fees because of the total failure of their lawsuit.

Second, petitioners' catalyst claim is chronologically unsustainable because Act 131 was enacted three months *after* the Ninth Circuit ruled *against* petitioners.

Third, petitioners assume that the catalyst theory of fee recovery is still viable after *Farrar v. Hobby*, 506 U.S. 103 (1992).[4] Even if true, that assumption does not detract from the fact that no circuit, including catalyst circuits, recognizes a totally adverse litigation outcome as a fee catalyst.

4. Vacatur Is Unwarranted

The vacatur doctrine of *United States v. Munsingwear*, 340 U.S. 36 (1950), and *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), addressing mooting events that occur prior to review/decision on appeal, does not

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[4]As reported in *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995), the Fourth Circuit has held that *Farrar* precludes a catalyst theory of fee recovery.

help petitioners. Those cases hold that where review is prevented through happenstance--that is, where mootness is due to circumstances unattributable to any of the parties--or where mootness results from unilateral action of the party (here, respondents) who prevailed in the court from which review is sought, the decision of that court may be vacated. The doctrine is rooted in the equitable notion that a "party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp,* 513 U.S. at 25. And the same holds true "when mootness results from unilateral action of the party who prevailed below."[5] *Id. Bancorp* explicitly rejected vacatur where the mootness resulted from settlement, noting that the "principal condition to which we have looked [in rejecting vacatur] is whether the party seeking relief from the judgment below caused the mootness by voluntary action." 513 U.S. at 24.

Thus, even if this case were moot,[6] this Court should nonetheless *not* vacate the Ninth Circuit merits decision because

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[5]It is clear that enactment of Act 131 was *not* the result of unilateral action of respondents Yoshina, Hirono, Cayetano, or the Office of Elections, the parties who prevailed in the Ninth Circuit.

[6]The certification of the 1996 election as rejected remains on the books. The election does not bear the stigmatic result of "result undetermined until, by federal court order, a new, fair election is held."

Petitioners' claim of mootness is based on the theory that the 1998 legislative-option election on the constitutional convention question is an *equal substitute* for the 1996 constitutionally-mandated election. "Petitioners asked for one new vote. They got one." (Pet. at 23). In light of this representation and in light of petitioners' representation that they have already obtained the "principal relief sought" (Pet. 179a), this Court need not reach the issue whether the request for re-certification relief is moot or not. That request has either been abandoned or would result in duplicative relief.

petitioners themselves acquiesced in the alleged mooting action, i.e., the enactment of Act 131. Indeed, petitioners lobbied for passage of Act 131. Whether or not petitioners can be said to have directly "caused the mootness by voluntary action"--i.e., whether or not their lobbying in favor of Act 131 directly caused the bill to pass--they actively supported passage of Act 131. (Pet. App. 219a-221a; 225a-231a). Because petitioners lobbied for, and for whatever reason received, precisely what they wanted (namely, enactment of Act 131), knowing full well that they would then claim that Act 131 mooted the Ninth Circuit ruling adverse to them, it is not unfair that they cannot have the adverse ruling vacated. Petitioners' desire to obtain review of the adverse Ninth Circuit ruling was frustrated not by "the *vagaries of circumstance*," but by circumstances *they actively courted*. The equitable considerations that underlie the vacatur doctrine are plainly inapplicable to petitioners. Their actions lie at the voluntary end of the equitable spectrum and are far removed from the happenstance end.

B. THERE IS NO BASIS FOR REVIEW OF THE NINTH CIRCUIT DECISION

1. The Ninth Circuit Decision Is Correct On The Merits

The request for a GVR order, standing alone, should be denied and additionally should be denied because the case does not merit review in any event.

The Ninth Circuit correctly rejected petitioners' constitutional challenge to the 1996 election even under the assumption--erroneous, we submit--that the inclusion of blank ballots in the denominator of "ballots cast upon the question" diverged from past practice. Because the record fails to support that assumption, petitioners' constitutional claims are particularly insubstantial.

The role of the federal courts in state elections is exceedingly narrow. First, the correctness of the Hawaii Supreme Court in *Yoshina* is beyond the purview of this or any federal court. "Neither [the United States Supreme Court] nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state." *Johnson v. Fankell*, 520 U.S. 911, ___,117 *S.Ct. 1800, 1804 (1997).*

Second, extreme caution is required when state election results are challenged. The federal appellate courts uniformly recognize that federal intervention in state elections "necessarily implicates important concerns of federalism and state sovereignty . . . . Indeed, the voiding of a state election is a "drastic if not staggering" remedy." *Soules v. Kauaians For Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988) (citations omitted). Invalidation is "reserved for instances of willful or severe violations of established constitutional norms." *McMichael v. County of Napa*, 709 F.2d 1268, 1273 (9th Cir. 1983) (Kennedy J., concurring) (citing *Griffin v. Burns*, 570 F.2d 1065, 1080 (1st Cir. 1978)).

Third, the Ninth Circuit in this case recognized and applied the distinction between "fundamental unfairness" and "garden variety election irregularities" (Pet. App. 16a-17a) that is uniformly recognized and applied by the circuit courts of appeals.[7]

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[7]The Ninth Circuit cited *Soules*, 849 F.2d at 1183-84 for this proposition. *Soules* in turn cites cases from the First, Fourth, Fifth, Seventh, Eight, and Eleventh circuits for the "hornbook law" that section 1983 does not provide a right of action for garden variety election regularities and that only a pervasive error which undermines the organic processes of the ballot is sufficient to trigger constitutional scrutiny. *Id. See also Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir. 1995), cert. denied sub nom. *Davis v. Alabama*, 516 U.S. 908 (1995).

The Ninth Circuit brought common sense to bear on petitioners' theory that the persons casting *blank* ballots on a "yes" or "no" question secretly favored the "yes" position:

> Citizens who wished to vote "yes" or "no" were presented with a clear way to do so. Voters who didn't care simply left the question blank. It is beyond belief to suggest that thousands of voters who left the convention question blank were secretly relying on the hope that their votes would not be counted, and that they would have voted "yes" had they foreseen the decision in *Yoshina* I. They did not vote because they did not care or did not care enough to do so.

(Pet. App. 19a-202).

The few cases in which federal courts have found fundamental unfairness justifying intervention in state elections largely involve legerdemain or outright fraud or racial discrimination (or a combination) in absentee ballots. E.g. *Roe v. Alabama*, 68 F.3d 404 (11th Cir. 1995) (inclusion of improper absentee ballots diluted proper absentee and in person ballots); *Marks v. Stinson*, 19 F.3d 873 (3rd Cir. 1994) (massive absentee ballot fraud); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (exclusion (with racial overtones) of proper absentee and shut-in ballots disenfranchised almost ten percent of the voters).

All Hawaii voters in the 1996 general election received the ballot on the constitutional convention question. No Hawaii voter was disfranchised. All ballots were counted as cast--the yes ballots as yes, the no ballots as no, and the blank ballots as blank, all just as they always have been counted and just as they were subsequently counted in 1998. No Hawaii voter suffered a dilution of his or her vote because of the inclusion of illegal or invalid ballots. All that happened was that the blank ballots cast

were included in the denominator of ballots cast upon the question in calculating whether the numerator yes votes were a majority of votes on the constitutional convention question.

2. The Relief of Re-Certification Is Unattainable

Not only is there no reason in the law for this Court to grant plenary review of the merits of the Ninth Circuit decision, but the purpose for which petitioners seek such review is unattainable and frivolous.

Specifically, petitioners, who claim to have previously obtained the principal relief sought, now seek review of the merits for the purpose of obtaining the "alternate" relief sought of a federal court order re-certifying as approved the 1996 constitutional convention question that stands certified as rejected. This retrospective re-certification is unavailable. First, the "alternate" relief is cumulative and duplicative to the "principal relief" that petitioners claim to have obtained from Act 131. Second, a re-certification order could only be based upon not counting the blank ballots as ballots cast upon the question, in direct violation of the decision of the Hawaii Supreme Court, the final arbiter of the Hawaii Constitution, that the blank ballots are counted as ballots cast upon the question.[8]

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[8]In contrast, if a federal court decided that the 1996 election on the constitutional convention question was fundamentally unfair and ordered a *re-vote*, the re-vote order would not violate *Yoshina* by consigning the 1996 blank ballots to the "do not count" category.

In *Roe*, the Eleventh Circuit made the unremarkable observation that the decision of the Alabama Supreme Court construing an Alabama statute did not address the issue whether constitutional rights had been infringed. 68 F.3d at 409. The *Roe* court did not address the question of the propriety of a *remedy* in contravention of the construction of the state supreme court.

Furthermore, granting petitioners' request for re-certification of the 1996 election results would require retroactively undoing the existing certification that the 1996 constitutional convention question was rejected. This would violate the Eleventh Amendment. *Cf. Papasan v. Allain*, 478 U.S. 265, 279-81 (1986) (*retrospective* injunctive relief does *not* fall within *Ex parte Young* exception to Eleventh Amendment bar).

3. Petitioners' Supplemental Brief Is Nonsensical

Petitioners' supplemental brief makes three arguments that are wholly without merit. First, petitioners claim that the fact that the 1998 blank vote percentage was lower than the 1996 blank vote percentage proves that voters were misled in the 1996 election about the meaning of blank votes. This is baseless speculation. There could be any number of *other* reasons--including the electorate being better informed the second time around about the pros and cons of holding a constitutional convention--to explain why the blank vote percentage decreased. Petitioners provide this Court with no evidence to support their speculative theory over any other explanation.[9]

Second, petitioners argue that the mere fact that the 1998 vote *occurred* furthers their "prevailing party" theory. But the fact of the 1998 election is hardly a revelation, because the enactment of Act 131 in June 1998 made it a foregone conclusion that a vote would occur in November 1998. Time

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[9] If anything, the 1998 election results debunk the entire theory of petitioners' case that persons casting blank ballots in 1996 on a yes or no question secretly favored the yes position. From 1996 to 1998, the yes vote *decreased* by some 23,000 votes. That is, the blank ballots went to no rather than to yes.

passed; the election happened. More importantly, the fact that the 1998 vote occurred does nothing to overcome the fatal defects in petitioners' attorneys fee claim: 1) the fact of the complete failure on the merits of their lawsuit and 2) the fact that Act 131, which produced the 1998 vote, was enacted *after* their lawsuit had been flatly rejected.

Third, the mere fact that the Ninth Circuit has not, to this date, acted upon petitioners' fee motion does not in any way suggest that this court should GVR this case[10]. The Ninth Circuit could act at any time, and petitioners do not suggest any reason not to wait. Petitioners do not even suggest that the "delay" is causing them any harm, much less irreparable harm. And, if it were, their remedy would be mandamus rather than certiorari.

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[10] It may be that, at this juncture, the Ninth Circuit is waiting for this Court to act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DOROTHY SELLERS
GIRARD D. LAU*
Deputy Attorneys General
State of Hawaii
*Counsel of Record

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1360

Counsel for Respondents Dwayne D. Yoshina, Chief Election Officer of the State of Hawaii, Mazie K. Hirono, Lieutenant Governor of Hawaii, Benjamin J. Cayetano, Governor of Hawaii, in their official capacities, and Office of Elections, State of Hawaii

No. 98-671

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

CITIZENS FOR A CONSTITUTIONAL CONVENTION, LET THE PEOPLE DECIDE, and MARK J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, and JERRY BECK, on behalf of themselves and others similarly situated,

Petitioners,

v.

DWAYNE D. YOSHINA, Chief Election Officer of the State of Hawaii, MAZIE K. HIRONO, Lieutenant Governor of Hawaii, BENJAMIN J. CAYETANO, Governor of the State of Hawaii, in their official capacities; OFFICE OF ELECTIONS, STATE OF HAWAII; HAWAII STATE AFL-CIO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

STEVEN SCOTT MICHAELS*
**Counsel of Record*
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, NY 10022
(212) 909-7265

MARK J. BENNETT
McCORRISTON MIHO MILLER MUKAI
Five Waterfront Plaza
Honolulu, HI 96813
(808) 529-7300

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

Respondents[1] labor to divine (and wrongly belittle) what is "of importance to petitioners" (Resp. Br. at 1). The main issue is what is important to this Court. Where a GVR order is concerned, *Lawrence v. Chater*, 516 U.S. 613 (1996), lays out those factors, and compels a GVR here. Respondents fail to show why this limited relief, or, for that matter, plenary review, is unwarranted in this case.

A. The Issues Presented by the Petition are Ripe; Indeed, Respondents' Arguments Here Contradict Their Position on Ripeness in the Ninth Circuit.

Respondents' claim that the Petition is "premature" (Resp. Br. at 10-11) is (a) wrong and (b) undermined by their arguments below opposing Petitioners' post-mandate motions. Indeed, the lead argument Respondents made below on this front was that the Ninth Circuit was procedurally barred from acting. Arguing to the Ninth Circuit that "[t]he judgment and mandate of this court have issued" and "[c]ertiorari lies to the Supreme Court,"[2] Respondents argued that the panel should deny relief as a motion to recall the mandate is a "rare and extraordinary step" that should be granted "only for the

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[1] Putative intervenors have waived their opposition as well as the right to cross-petition. Petitioners do not seek fees or costs from putative intervenors. Pet. App. 208a.

[2] As this Court is aware, a writ of certiorari does not "lie to the Supreme Court," but rather is issued to a lower court. The Attorney General's misdescription does not diminish the impact of her contradictory positions.

most compelling reasons." *See* Pet. App. 249a-50a. Put simply, Respondents, having argued to the Ninth Circuit that it should deny relief because the remedy lies *here*, now argue that this Court should deny relief because the remedy lies *there*. This two-facedness shows why a GVR is proper, if only to prevent a miscarriage of justice and a denial of Due Process.

Respondents' effort to blame Petitioners for filing a post-mandate motion below (Resp. Br. at 10) does not counsel against a GVR. Petitioners promptly and properly sought post-mandate relief hoping the Ninth Circuit, before the time for review here expired, would eliminate, or limit, the need for a writ.[3] The attack on that motion is groundless. Although the motion to recall was well founded, *see* Pet. App. 204a, the main reason it seems "the Ninth Circuit is waiting for this Court to act" (Resp. Br. at 19 n.10) is that court's likely desire to avoid ruling on when a recall is proper, an issue Respondents have pressed vigorously.[4] To deny a writ on grounds of prematurity, when Respondents are pressing procedural bars below, would countenance the kind of "manipulative litigation strategy" *Lawrence* condemns. 516 U.S. at 168. Petitioners do not seek review "before judgment is entered" below. S. Ct. R. 11. The judgment is "entered," and enforceable. This case is ripe.

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[3] Justice O'Connor's order granting an extension of time in which to seek a writ (Pet. App. 129a), although issued upon consent, was sought based on these considerations.

[4] This Court, by granting the writ, would spare (1) the Ninth Circuit from the need to address this issue; and (2) itself from the need to address the burdensome mandamus remedies Respondents suggest (Resp. Br. at 19).

B. Because the Ninth Circuit Had No Notice of Act 131's Passage, Nor Even an Assurance that it Would Become Law, When It Acted on June 23, 1998, There Is A Sufficient Chance of a New Result on Remand.

Respondents oppose a GVR because the panel "was fully apprised of, and presumably considered, the *potential* enactment of Act 131 long before it denied rehearing." Resp. Br. at 11 (emphasis added). The answer is that there are lots of "potential" laws that could moot or alter cases; but a "potential" law does not count. When the panel acted it had no assurance H.B. 3130 would in fact become law or notice of Act 131's enactment.

On June 21, 1998, 88 days had passed from the initial panel decision. The Governor had not acted. He did not need to do so until July 8. An April 29 news report stated his view as lukewarm at best: "[t]he governor has said he is opposed to a Con Con but has also said he would not veto the bill." Pet. App. 241a. Nothing had been heard from him since. His appointee, the Attorney General, did not notify the panel or Petitioners of any bill signing, and does not deny that it would have been impossible to stop the panel from acting in the hours between enactment and entry of the order on rehearing. No one contends the panel knew of Act 131, or the parties' views of its effects, on June 23, 1998.

The June 23, 1998, order, properly viewed, reflects no more than concern for expedition in an election case where the clock was ticking on the practical deadline for judicial resolution of equitable orders for the November election. *See Williams v. Rhodes*, 393 U.S. 23, 35 (1968). The

Ninth Circuit had expedited this case (Pet. App. 102a), and may well have thought that it was appropriate to deny rehearing without waiting further for the Governor, so as to permit election-related stay proceedings here to be concluded in an orderly way. This is at least a case where new events occurred "so shortly before the lower court's decision that the lower court had no 'opportunity' to [consider] them." 516 U.S. at 169. The lower court(s) should have a full chance to consider the impact of Act 131. A GVR is proper.

C. A GVR Would Properly Allow the Panel to Revisit Its Liability Ruling In Light of Act 131; At a Minimum the Merits Issues Warrant Review Here.

This case is about more than just fee issues – important as they are. The panel ruling conflicts with landmark election cases, from *United States v. Classic*, 313 U.S. 299 (1941), to *Burdick v. Takushi*, 504 U.S. 428 (1992). Ignoring those conflicts, Respondents conclusorily claim that the broad panel ruling "applied the distinction between 'fundamental unfairness' and 'garden variety election irregularities.' " Resp. Br. at 15.

This superficial argument is perhaps the strongest reason to grant review. Liability here turns on what "fundamental fairness" *means*. As Petitioners have shown, the panel ruling permitting retroactive application of an unexpected supermajority vote-counting rule defies *Classic*'s holding that Americans are entitled "to have their votes counted *as cast*," not "as retroactively interpreted." It conflicts with *Burdick*'s holding that voters must have

the chance "to act in a timely fashion" under election laws. Respondents have no, let alone a good, answer to this.

Respondents cannot mask the conflict the panel engenders with *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), and *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978). They paint *Roe* as involving "inclusion of improper absentee ballots [that] diluted proper absentee and in person ballots" (Resp. Br. at 16). But *Roe*, which agreed that inclusion of the at-issue ballots was not "improper" under state law, held that the state courts' application of the "substantial compliance" doctrine was unanticipated, and, thus, federally void. *See* 43 F.3d at 577, 578 n.6, 581. Likewise, though Respondents describe *Griffin* as involving a refusal to count "proper absentee and shut-in ballots [that] disenfranchised almost ten percent of the voters" (Resp. Br. at 16), at issue there was an authoritative, but unanticipated (and thus federally void) retroactive ruling by the Rhode Island Supreme Court that took "absence of express reference to party primaries in the statute authorizing absentee and shut-in voting as a clear indication that such ballots were not legally authorized in primaries." 570 F.2d at 1068 n.4.

What the Ninth Circuit here strained to, but could not, hide, is that *Hawaii AFL-CIO v. Yoshina*, 935 P.2d 89 (Haw. 1997), is virtually identical to, if not worse than, the retroactive state court rulings in *Roe* and *Griffin*: In Hawaii, blank ballots "were simply ignored" and " 'Yes' votes were counted against 'no' votes and the majority ruled." Pet App. 7a. *Yoshina* radically changed that practice.

Respondents have no real response to this, other than to recite the panel's disparaging characterization of those returning blank ballots as "don't care" voters, and their attempt to label this view, which conflicts with the view of the "right to vote" in *Roe*, *Griffin*, and elsewhere, as "common sense." Resp. Br. at 16. Left to stand, the panel ruling leaves voters in the Ninth Circuit dramatically, and uniquely, unprotected against unexpected retroactive state court rulings on issues central to the right to vote.

Now that the Act 131 vote has occurred, any justification for refusing to disturb the panel's liability ruling has been eliminated. Both sides, as Petitioners show (Pet. at 23; Supp. Br. at 3), and Respondents confirm (Resp. Br. at 13 n.6, 17), have new arguments based on Act 131 that, if accepted, would very likely affect the panel judgment.[5] The panel should consider them. A GVR order should issue.[6] Alternatively, the Court should grant plenary

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[5] Respondents' Eleventh Amendment argument (Resp. Br. at 18), however, has already been persuasively rejected.

[6] The idea that Petitioners cannot seek vacatur of the judgment on their claim for a new vote because they urged passage of Act 131 (Resp. Br. at 13-14) rests on an implausible reading of *U.S. Bancorp v. Bonner Mall*, 513 U.S. 18 (1994). Before *Bancorp*, the Court routinely directed vacatur when the President signed legislation eliminating a controversy involving a Department under his supervision. *See, e.g., Department of the Treasury v. Galioto*, 477 U.S. 556, 560 (1986). Nothing in *Bonner Mall* changed this practice; a fortiori, it would be bizarre to deprive a citizen who advocates for, but is legally powerless to cause, legislation to be passed, of the ability to seek vacatur. At a minimum, the panel should deal with this issue after a GVR order enters.

review to consider the important liability and remedial issues here.[7]

D. A GVR Would Give the Panel the Opportunity to Consider Petitioners' Important § 1988 Claims; Alternatively, Plenary Review Should be Granted to Review the Threshold § 1988 Issues Involved.

Respondents do not dispute that this Court has long recognized that, under 42 U.S.C. § 1988, " 'parties may be considered to have prevailed when they vindicate rights . . . without formally obtaining relief.' " *Maher v. Gagne*, 448 U.S. 133 (1980). Nor do they deny that "whether the lawsuit was causally linked to the relief actually obtained"[8] is "a factual determination for the district court,"[9] and, as we contend, "should be resolved on a remand." Pet. at 24 n.19.

Even so, Respondents ask this Court to deny a remand on the § 1988 claim here because "petitioners lost across the board in the Ninth Circuit" and "obtained

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[7] These include whether, as in *Roe v. Alabama*, 68 F.3d 404 (11th Cir. 1995), the remedy should be an order that unstuffs the ballot box and recertifies the 1996 vote totals. Respondents' strained effort to distinguish *Roe* on the ground that the Hawaii Supreme Court has somehow ruled on the remedy for the unconstitutional retroactive application of *Yoshina* (Resp. Br. at 17 n.8) is baseless. The *Yoshina* court did not have either the constitutional question of liability, or the federal question of remedy, before it, because the Attorney General – the only *party* who could have raised them – forfeited those issues.

[8] *Sablan v. Dep't of Finance*, 856 F.2d 1317, 1325 (9th Cir. 1988).

[9] *McQuiston v. Marsh*, 707 F.2d 1082, 1085 (9th Cir. 1983).

nothing *in* their lawsuit" (Resp. Br. at 12) (emphasis modified). This bold argument is without support, and, if accepted, would work radical changes in the dynamics of litigation under dozens of federal statutes and allied fee-shifting laws. First, as legislative relief is not granted "in" a lawsuit, Respondents' position "negate[s] the possibility of ever granting attorneys' fees when Congress [or a state legislature] amends or clarifies legislation and thereby secures plaintiff's requested [relief]." *Paris v. HUD*, 988 F.2d 236, 241 (1st Cir. 1993). Second, under it, if officials survive the "first round" of appeal, they are free to sign mooting legislation, and avoid both further review and the payment of fees, irrespective of the strength of the underlying claim, or the reasons for legislative action. By granting a "free pass" for positions that survive initial review, Respondents' view would discourage early settlement, a central goal of § 1988. It would also enshrine in law the disturbing idea that litigation "ends" with an initial panel ruling, and a benefit conferred thereafter is automatically "gratuitous." Aside from ignoring FRAP 35 and 40, this view ignores the Constitution. Article III states there "shall be" "one supreme Court," and, for better or worse, that Court is not composed of three-judge panels that sit in San Francisco. The possibility of review in this Court should not artificially be eliminated from the calculus for deciding whether "catalyst" fees are available. Unless the "catalyst" theory of fee recovery is dead, an issue this Court has not resolved, and may wish to review here, Petitioners are entitled as a matter of Due Process to prosecute their fee claim on the merits in the District Court.

CONCLUSION

For the reasons above, in the petition, and in the supplemental brief, the petition should be granted, the judgment vacated, and the case remanded to the Court of Appeals for further consideration of Petitioners' claims for equitable relief, attorneys fees, and other costs, in light of Act 131, its history, and the vote had on November 3, 1998, or with such other instructions as the Court finds appropriate. In the alternative, the Court should grant plenary review as to the second question presented.

Respectfully submitted,

STEVEN SCOTT MICHAELS*
*Counsel of Record
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, NY 10022
(212) 909-7265

MARK J. BENNETT
McCORRISTON MIHO MILLER MUKAI
Five Waterfront Plaza
Honolulu, HI 96813
(808) 529-7300

Counsel for Petitioners

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